Notre Dame Law Review

Volume 82 | Issue 3 Article 3

12-1-2006

The Enemy Combatant Cases in Historical Context: The Inevitability of Pragmatic Judicial Review

Robert J. Pushaw

THE "ENEMY COMBATANT" CASES IN HISTORICAL CONTEXT: THE INEVITABILITY OF PRAGMATIC JUDICIAL REVIEW

*Robert J. Pushaw, Jr.**

INTRODUCTION

What is the judiciary's proper role in reviewing claims that the federal government, in attempting to protect national security, has violated individual rights? This perennial constitutional question has arisen with renewed urgency since the attacks of September 11, 2001.

A week after that tragedy, Congress authorized the President to use "all necessary and appropriate force" against those who planned, committed, or aided the terrorist attacks and to prevent similar future assaults.[1] George Bush invoked this statute, as well as his broad Article II power as Commander in Chief, to wage war against al Qaeda in Afghanistan and to (1) indefinitely jail anyone whom he alone deemed an "enemy combatant" (i.e., part of forces engaged in armed conflict with the United States), and (2) try such prisoners by military commissions of his creation.[2]

The Supreme Court has invalidated both of these policies. In three cases handed down in 2004, a majority of Justices held that alleged "enemy combatants" (both citizens and aliens) could invoke federal habeas corpus jurisdiction to vindicate their due process right to an impartial hearing concerning the lawfulness of their deten-

* James Wilson Endowed Professor, Pepperdine University School of Law. J.D., Yale, 1988. Thanks to Tracey George, Barry McDonald, Grant Nelson, and Jim Pfander for their very helpful comments.

1 Authorization for Use of Military Force (AUMF), Pub. L. No. 107–40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. III 2003)).

2 *See* Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C. § 801 (Supp. IV 2004).

tions.[3] The Court declined to decide, however, whether a military commission would be sufficiently impartial.[4] In *Hamdan v. Rumsfeld*,[5] the Court ruled that Congress had not authorized President Bush to establish such commissions at the United States Naval Base in Guantanamo Bay, Cuba.[6] All of these cases featured vigorous dissents, with Justice Thomas taking the lead in arguing that the judiciary had ignored both precedent and national security by interfering with the President's discretionary exercise of his Article II power.[7]

Most legal scholars, who have persistently assailed the Bush Administration's treatment of enemy detainees,[8] praised the Justices for their courage in upholding cherished individual liberties and the rule of law.[9] Indeed, some commentators have discerned a larger his-

---

3 *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion); Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004). These cases are discussed in Part III.A.

4 *Hamdi*, 542 U.S. at 538.

5 126 S. Ct. 2749 (2006).

6 *Id.* at 2772–98.

7 Only Justice Thomas dissented in *Hamdi*. 542 U.S. at 579–99. He and Chief Justice Rehnquist joined Justice Scalia's dissent in *Rasul*, 542 U.S. at 488–506. In *Hamdan*, Justice Thomas and two colleagues filed separate dissents. *See Hamdan*, 126 S. Ct. at 2810–23 (Scalia, J., dissenting); *id.* at 2823–49 (Thomas, J., dissenting); *id.* at 2849–55 (Alito, J., dissenting).

8 *See* Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 273 (2002) (citing the condemnation of military commissions by prominent law professors such as Bruce Ackerman, George Fletcher, Harold Koh, Judith Resnik, and Anne-Marie Slaughter). Professor Cole has been the leading academic critic. *See, e.g.*, DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003) [hereinafter Cole, *Judging*]; David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003); David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753 (2004) [hereinafter Cole, *Morality*]. Other important works include Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767 (2002); Jordan J. Paust, *Post 9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335 (2004). For a contrary view, see Adrian Vermeule, *Libertarian Panics*, 36 RUTGERS L.J. 871, 872, 881, 886–87 (2005) (decrying the response of intellectual elites to post-September 11 measures as often "ignorant," "irrational," "hysterical," and reflective of an extreme libertarian bias that, if implemented, would result in legal and institutional mechanisms that would under-protect national security).

9 For example, Professor Cole characterized *Hamdan* as

> equal parts stunning and crucial. Stunning because the Court, unlike Congress, the opposition party or the American people, actually stood up to the

torical movement in which the modern Court has become increasingly willing to rein in the government's assertion of war powers.[10] Ideally, they would favor the execise of ordinary "judicial review"—i.e., independently interpreting and applying the Constitution, regardless of the competing views of Congress or the President.[11]

> President. Crucial because the Court's decision . . . marked . . . a dramatic refutation of the administration's entire approach to the "war on terror." . . . [T]he *Hamdan* case stands for the proposition that the rule of law . . . is not subservient to the will of the executive, even during wartime.

David Cole, *One Nation Under Law—Not Bush*, SALON.COM, July 25, 2006, *http://www.salon.com/opinion/feature/2006/07/25/hamdan/index.html*. Similarly, Harold Koh deemed *Hamdan* "a stunning rebuke to the extreme theory of executive power that has been put forward for the last five years." *See* Charlie Savage, *Justices Deal Bush Setback on Tribunals*, BOSTON GLOBE, June 30, 2006, at A1 (citing Koh); *see also* Martin S. Flaherty, *More Real Than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive "Creativity" in* Hamdan v. Rumsfeld, 2006 CATO SUP. CT. REV. 51, 51 ("Rarely has the Supreme Court handed a 'wartime' president a greater defeat, or human rights defenders a greater victory."); *id.* at 82 (describing *Hamdan* as "an act of courage"). Hamdan's lead attorney, Georgetown Law Professor Neal Katyal, applauded this "rare Supreme Court rebuke to the President during armed conflict." Neal Kumar Katyal, Comment, Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 66 (2006); *see also id.* at 69–70, 92, 97–116 (contending that the Court correctly rejected the Bush Administration's "radical" and "dangerous" theory that the judiciary should show extreme deference to the President's assertion of "inherent authority" to ignore or creatively interpret statutes and treaties governing military affairs).

The *Hamdi* trio of cases has elicited similar praise. *See, e.g.*, Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment's Shadow*, LAW & CONTEMP. PROBS., Spring 2005, at 255, 264 (noting that many "[c]ivil libertarians and progressives . . . applauded" these decisions); Burt Neuborne, *The Role of Courts in Time of War*, 29 N.Y.U. REV. L. & SOC. CHANGE 555, 564–72 (2005) (citing *Hamdi* and *Rasul* as illustrating that the Court sometimes acts courageously in limiting military programs to defend constitutional values); Jordan J. Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 SANTA CLARA L. REV. 829, 830–41 (2005).

10 *See* Cole, *Morality*, *supra* note 8, at 1761–63 (making this claim, but acknowledging cases in which the Court failed to check government abuses in wartime); *see also* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 221 (First Vintage Books ed., Vintage Books 2000) (1998) (discerning a positive overall trend toward protecting individual rights despite certain decisions to the contrary); Goldsmith & Sunstein, *supra* note 8, at 262, 285 (maintaining that Americans' regret over unnecessary or excessive curtailment of individual rights in prior wars "produces a ratchet effect, over time, in favor of more expansive civil liberties during wartime"); Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 39 (2002) (urging Americans to obey, not ignore, the elaborate laws that have been developed over the years to deal with security crises such as the al Qaeda attacks).

11 These critics argue that the Constitution originally contemplated that federal judges would ensure that a President's military action had been taken pursuant to Congress's declaration of war (or equivalent authorization) and had not violated indi-

By contrast, a few legal academics, most notably John Yoo, have maintained that the Constitution (1) entrusts all military powers to the political branches; (2) establishes a unitary executive uniquely capable of taking swift action based on the expert advice of officials who possess confidential information; and (3) sharply limits judicial review of wartime decisions.[12] These scholars have defended the Bush

---

vidual legal rights. They lament that both the Court and Congress have often shirked their constitutional duties to check the executive, resulting in a systematic and permanent reduction in civil liberties. *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY 5–11 (1993); LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING 3–14 (2000); LOUIS FISHER, PRESIDENTIAL WAR POWER 6–16 (2d ed. 2004) [hereinafter FISHER, PRESIDENTIAL WAR POWER]; THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS 3–9 (1992); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 80–95 (1990); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 74–77, 158–61 (1990); Lobel, *supra* note 8, at 767–90; Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 677–88 (1972); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 675–86 (2002); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 700, 740–56 (1997).

Two scholars have urged federal courts to apply ordinary administrative law standards, which feature deferential yet meaningful judicial review of the decisions of expert agencies. *See, e.g.*, Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441 (2005); Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903 (2004). Under this approach, judges would take a "hard look" at the President's factual and legal determinations to ensure that he has provided a rational justification, based on substantial evidence, for a particular military action. *See* Masur, *supra*, at 443–56, 482–501, 519–21; Wells, *supra*, at 944–48.

Such proposals raise several problems. First, standards of judicial review under the Administrative Procedure Act, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 701–706 (2000)), for executive actions taken pursuant to garden-variety regulatory statutes are not obviously relevant to presidential decisions about war made under a Constitution that predates the administrative state by a century-and-a-half. Second, agencies act on a publicly available record, whereas the President and his subordinates make military decisions based upon information that is often confidential; therefore, a court order compelling disclosure of these facts raises serious separation-of-powers concerns. *See* United States v. Nixon, 418 U.S. 638, 705–06 (1974). Finally, it seems unrealistic to expect judges to hold that the President's proffered reasons for a military decision were irrational and unsupported—or for the President to obey such a judgment when he has concluded that America's security is at risk. *See* Robert J. Pushaw, Jr., *Defending Deference: A Response to Professors Epstein and Wells*, 69 MO. L. REV. 959, 968–70 (2004).

12 *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996) [hereinafter Yoo, *Continuation*]; John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002) [hereinafter Yoo, *War*]; *see also* H. Jefferson Powell, *The President's Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527 (1999) (contending that the Constitution grants the executive primary, but not exclusive or unlimited, power to conduct foreign policy and preserve national security).

Administration's War on Terrorism[13] and condemned the "enemy combatant" cases as unprecedented intrusions into the executive's domain.[14]

Each side in this debate makes a valuable contribution, but neither fully captures the complexity of judicial review in this area. The Bush critics correctly stress that only autonomous Article III judges can ensure that Congress and the President stay within legal bounds and can protect individual rights in times of crisis, and they cite several cases in which the Court has done so.[15] These scholars cannot, however, persuasively tell us why military decisions have always been accorded a far more deferential standard of judicial review than purely domestic ones, with the result that the government's policies usually pass muster—even seemingly blatant constitutional violations such as Franklin Roosevelt's mass imprisonment of Japanese-Americans during World War II.[16] Moreover, some civil libertarians have engaged in wishful thinking by suggesting that the modern Court has

---

Similarly, Professors Posner and Vermeule have commended federal judges for showing extra deference during times of crisis. *See* Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003). In their view, the Court has rationally concluded that the benefits of passivity—enabling the politically accountable executive to act quickly and decisively based upon superior military expertise and access to information—outweigh the costs of potential government abuse or curtailment of civil liberties. *See id.* at 606–11, 639–44; *see also* Earl M. Maltz, *The Exigencies of War*, 36 RUTGERS L.J. 861, 869–70 (2005) (claiming that courts must be extremely deferential to government actions taken during a total war or insurrection, because judicial intervention to uphold individual rights poses intractable practical problems and might result in a disaster).

13 They assert that terrorists are not ordinary criminals entitled to regular judicial processes but rather nonuniformed enemy warriors to be dealt with by the President according to the law of war, which allows both detention for the duration of the armed conflict and trials by military tribunals. *See* Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 10–20 (2003); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 215–28 (2003).

14 *See* John Yoo, *An Imperial Judiciary at War:* Hamdan v. Rumsfeld, 2006 CATO SUP. CT. REV. 83 (maintaining that the Court in *Hamdan*, as in *Hamdi* and *Rasul*, ignored centuries of constitutional practice and precedent by interfering with the President's Article II power to make military policy judgments and forced the political branches to expend resources that would be better spent fighting terrorists).

15 *See, e.g.*, Cole, *Judging*, *supra* note 8, at 2566–67, 2572–73.

16 *See* Korematsu v. United States, 323 U.S. 214, 219 (1944) (upholding the executive branch's judgment that the war against Japan required the forcible relocation of Japanese-Americans to prevent espionage and sabotage, despite infringements on their due process and equal protection rights). Libertarians might respond that such cases were wrongly decided by weak Courts, but this argument does not explain the frequency of such "bad" decisions throughout history and their support by Justices of varying political and ideological stripes.

been progressing in the direction of ever-expanding protection of individual rights against assertions of war powers.[17]

At the other end of the spectrum, President Bush's defenders accurately highlight the dominant constitutional role of the political branches (especially the executive) in military affairs and the correspondingly restricted nature of judicial review.[18] Nonetheless, they have trouble accounting for several cases in which the Court has struck down war measures.[19]

---

17 An exhaustive recent study of cases over the past sixty years demonstrates that the Court consistently sacrifices constitutional rights and liberties during emergencies. Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005). This phenomenon dates back to the earliest days of the Republic. *See, e.g.*, GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004) (urging that, to avoid repeating mistakes such as the Alien and Sedition Acts of 1798 and the targeting of Communists in the 1950s, America must develop a culture of civil liberties—implemented through government mechanisms and legal doctrines—to deal with the inevitable stresses of wartime, especially the tendency to suppress dissent). For similar themes, see, for example, MARTIN S. SHEFFER, THE JUDICIAL DEVELOPMENT OF PRESIDENTIAL WAR POWERS (1999); MICHAEL LINFIELD, FREEDOM UNDER FIRE (1990).

Professors Posner and Vermeule have dismissed, as empirically unsustainable, the notion of a "libertarian ratchet" (i.e., that wars have ended up producing ever-greater respect for civil liberties). *See* Posner & Vermeule, *supra* note 12, at 622–25. They also reject the opposite claim that increased executive powers granted during an emergency always become permanent, thereby irreversibly diminishing individual rights. *Id.* at 609–21. Rather, they conclude that there are no uni-directional trends: The government balances security and liberty interests in a complex policy calculus depending on the circumstances. *Id.* at 625–26.

18 *See infra* Part I (summarizing the constitutional framework).

19 Professor Yoo has argued that federal courts have appropriately adopted a unique approach to cases involving military affairs. John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427 (2003). On the one hand, the initiation of war abroad has been deemed a political question because the Constitution vests military powers exclusively in the political branches and does not specify a single required process for commencing war. *Id.* at 428–31, 433–36, 451. On the other hand, federal judges have examined the domestic ramifications of war—especially cases concerning American citizens as enemies or operations within the United States—but under a deferential standard that preserves options to the elected branches. *Id.* at 428–29, 440, 450–51.

Professor Yoo helpfully categorizes most Supreme Court decisions. For example, he is correct that judicial review has never been exercised over disputes arising out of the initiation of hostilities. *See infra* notes 58–63, 69–77, 83, 185–88 and accompanying text. Nonetheless, his suggestion that the Court adjudicates issues dealing with the domestic implications of war does not explain several critical decisions. For instance, the Court sometimes has refused to review executive judgments concerning military operations within the United States involving American citizens, most notably Lincoln's blockade of Confederate ports and his use of military commissions. *See infra* notes 86, 90, 100–06, 110–14 and accompanying text. Conversely, in certain situa-

Some commentators have rejected the extremes of "libertarian idealism" and "executive domination" and contended that the Court has properly applied a more balanced approach. For instance, Sam Issacharoff and Rick Pildes argue that the judiciary historically has played an important role during wartime; albeit not by making substantive judgments about constitutional rights or by assessing the significance of the President's national security claims.[20] Rather, the Court has preserved the institutional framework and processes through which decisionmaking on these issues occurs, primarily by deferring to executive conduct only if it has been endorsed by Congress.[21] Similarly, Cass Sunstein maintains that the Justices have appropriately employed a "minimalist" approach with several features, most crucially the requirement of clear legislative authorization for presidential military action intruding on constitutionally protected interests.[22]

---

tions, the standard of review of the domestic aspects of war has been anything but deferential. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582–89 (1952) (rejecting President Truman's attempt to seize steel mills to ensure material for the Korean War effort); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 107–32 (1866) (holding that the President cannot establish a military commission to try an American citizen when the civil courts remain open). Finally, the Court recently struck down government actions involving foreign military decisions, such as the detention and trial of alien enemy combatants captured and held outside the United States. *See infra* Part III.

20 *See* Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN L. 1, 7–8 (2004).

21 *See id.* at 4–8, 19, 25, 35–36, 44–45; *see also* Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL'Y REV. 153 (2004) (contending that the Court has properly insisted that the President can detain enemy combatants only with specific congressional authorization).

22 *See* Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 51, 53–54, 77–99. Professor Sunstein identifies two other aspects of minimalism. First, courts have upheld core due process values by insisting on fair hearings for those deprived of liberty. *Id.* at 51, 54, 99–103. Second, judicial decisions have tended to be narrow and incompletely theorized, thereby imposing only modest future constraints. *Id.* at 51, 54, 103–08; *see also id.* at 55, 77, 99 (recognizing that sometimes minimalism is inappropriate because courts must either uphold individual rights against egregious violations or, conversely, defer to the President acting alone in emergency situations).

Professor Sunstein rejects the position of "Liberty Maximalists" like David Cole as unrealistic (because judges will not aggressively protect freedom when the nation is at risk) and undesirable (since the government often has a strong justification to intrude on liberty during wartime). *Id.* at 50–52, 108. Conversely, Sunstein contends that "National Security Maximalists" like Justice Thomas, who advocate extreme judicial deference, ignore that (1) the Constitution divides war powers between Congress and the President; (2) the executive has political incentives to err on the side of excessive protection of public safety and hence to short-change liberty interests; and (3)

Professors Issacharoff, Pildes, and Sunstein are correct that the Court has focused on whether Congress authorized or approved the executive conduct being challenged. Unfortunately, this judicial determination is usually subjective because the relevant legislation does not unambiguously endorse or forbid particular acts, but rather broadly empowers the President to take steps that he deems appropriate to protect national security.[23] In actual cases, such vague statutes are interpreted as providing authorization when the Justices want to avoid confronting the President[24] and as withholding authorization when they wish to rebuke him.[25] Therefore, analysis should center

political safeguards do not work when government restrictions on liberty target a select group. *Id.* at 52–53, 65–75, 109.

23 *See, e.g.*, Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383, 388–89, 402–05 (2004) (stressing that congressional intent is often unclear and that judges have struggled to determine implied legislative authorization). Most pertinently, Congress's directive to the President to use "all necessary and appropriate force" against those connected with the September 11 attacks was comparable to the broad legislative delegations made in all declared wars and in other major conflicts like Vietnam, and therefore the validity of Bush's actions should be evaluated in light of executive practices under such legislation. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2048, 2052, 2076, 2078–83 (2005) (citing relevant laws). By contrast, in more limited military engagements, such as those against revolutionary France in the late 1790s and Somalia in 1993, Congress has carefully restricted the President's resources, methods, targets, purposes, and timetable. *Id.* at 2072–74. The meaning of such precisely drawn statutes rarely generates litigated disputes.

24 For example, in *Ex parte Quirin*, 317 U.S. 1 (1942), the Court construed a vague statute as empowering President Roosevelt to convene a military commission to try Nazi saboteurs. *Id.* at 38–39. The Court thereby sidestepped a showdown with FDR, who had indicated his intent to execute these men regardless of the outcome of the case. *See infra* notes 135–38 and accompanying text.

25 *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (interpreting a federal law that had reenacted verbatim the statute found in *Quirin* to have authorized military commissions as no longer providing such power, and construing other legislation that broadly authorized the President to use "all necessary and appropriate force" to fight al Qaeda as not permitting him to establish a military tribunal to try a trusted aide of Osama bin Laden); *see also infra* notes 316–38 and accompanying text (arguing that the implausibility of the Court's statutory interpretation suggested that its true motive was to chastise President Bush).

The scholars who advocate a moderate approach candidly acknowledge that judges have great latitude in interpreting generally worded statutes to ascertain whether or not they endorse executive military action. *See* Issacharoff & Pildes, *supra* note 20, at 37–38; Sunstein, *supra* note 22, at 97–99. Their efforts to resolve this problem are unsatisfying. For instance, Professors Issacharoff and Pildes claim that congressional approval is a "healthy fiction" because it always preserves the option for Congress to intervene if it disagrees with the President (or with the Court's determination that a statute did or did not authorize his conduct). Issacharoff & Pildes, *supra*

not on an illusory search for congressional intent, but rather on identifying the extra-statutory factors that influenced the Court to exercise its discretion to reach particular results.

In my view, the quest for a coherent jurisprudential framework is futile because the Constitution's text and history do not clearly reveal any single proper way to reconcile judicial review with war powers. This uncertainty has led the Court to eschew black-letter rules in favor of a flexible approach that reflects political and practical considerations. Perhaps the only bedrock principle is that the Court will almost never hear general claims that a military decision exceeded Congress's powers under Article I or the President's authority under Article II—for example, that the President has unconstitutionally initiated hostilities because Congress did not formally declare war.[26] When a party challenges the exercise of war powers *as violating his or her individual legal rights*, however, the Court usually has exercised judicial review, albeit with great deference to the political branches.[27] Nonetheless, the degree of deference has varied with the facts and

---

note 20, at 38–40. The fiction becomes unhealthy, however, if the Court creatively interprets a statute as denying the President a particular power to act, and that impotence causes Americans to be harmed or killed. Professor Sunstein asserts that the Court's demand for statutory specificity and clarity increases as the magnitude of the intrusion on individual liberty grows. Sunstein, *supra* note 22, at 97–99. That proposition is debatable. For example, the prisoners in *Quirin* had not merely their liberty but their lives at stake, yet the Court upheld their death sentences imposed by a military commission that had not been clearly or particularly authorized by the statute at issue. *See infra* notes 135–38 and accompanying text.

26 *See infra* notes 44–63, 68–77, 83, 100–06, 110–13, 123–27, 130–34, 153–63 and accompanying text. *But see* Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180 (1998) (maintaining that judges can review whether the President may lawfully send armed forces into combat, albeit with a strong presumption of validity when Congress has expressly or implicitly supported the action).

27 *See infra* notes 64, 78–81, 84, 117–22, 135–53, 163–75, 186 and accompanying text. On the surface, the modern Court usually applies a familiar test to alleged constitutional violations: The government cannot infringe due process, equal protection, free speech, or other fundamental rights unless it employs the "least restrictive means" to achieve a "compelling government interest." *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (creating this analysis). Strict application of this test, however, would invariably result in the government's victory because national security is the paradigmatic compelling interest, and judges typically cannot determine whether the means chosen by the President (who has access to classified information and expert military advisers) were the narrowest way to meet the threat. Moreover, in many cases the legal rights at issue derive not from the Constitution but from federal statutes, treaties, international law, or common law. Whatever the source of the individual right, however, the Court has shown respect for the judgments of the coordinate branches.

circumstances of each case, as the Justices have prudentially balanced several malleable factors.

One has been mentioned: The Court typically has yielded to the President if he had legal authority for his action, either because Congress approved of it (before or after it was taken) or Article II granted him independent power to proceed. Except in rare cases, however, such authorization is unclear.[28] Hence, judicial discussions of statutory and constitutional meaning tend to mask three impressionistic judgment calls.

First, the Court evaluates the gravity and immediacy of the military crisis, as well as the necessity for the President's responsive measure. Not surprisingly, the Court has granted the President far more latitude in addressing nation-threatening emergencies like the Civil War and World War II than lesser conflicts. Of course, distinguishing major from minor crises is very difficult for judges, who lack the President's access to military and foreign policy intelligence. The Court often has glossed over the problem of second-guessing the President's assessment that a particular conflict, such as the Korean War or the War on Terrorism, is urgently serious and thus requires a specific and strong response (e.g., taking over steel mills to ensure weapons production or using military tribunals to try enemy combatants).[29]

Second, the Justices consider the egregiousness and magnitude of the legal violation. For example, judges find unnecessary or arbitrary deprivations of bodily liberty more troublesome than temporary suppression of speech to protect our troops.[30] Again, this factor has built-in subjectivity, and hindsight often reveals that the heat of the moment clouded judgment. To illustrate, few executive decisions seem as monstrously unlawful as President Roosevelt's relocation of Japanese-Americans, yet the Court sustained this action.[31] By contrast, trying Osama bin Laden's henchman Yasir Hamdan by military com-

28 Article II simply dubs the President "Commander in Chief," without further elaboration. This silence makes it plausible to argue that the President's unilateral power should be broad, narrow, or intermediate. Likewise, most military authorization statutes do not speak with lucidity and precision. *See supra* notes 23–25 and accompanying text.

29 *See* Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 584–89 (1952); *Hamdan*, 126 S. Ct. at 2772–98.

30 Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (plurality opinion) (declaring that "the most elemental of liberty interests . . . [is] being free from physical detention by one's own government").

31 *Korematsu*, 323 U.S. at 217–18.

mission would not strike most Americans as a huge legal problem, but a majority of Justices thought otherwise.[32]

Third, the Court calculates the likelihood that its orders will be obeyed, which depends primarily upon the President's political strength and secondarily upon whether the crisis is ongoing or has passed.[33] This last criterion is never articulated but often seems pivotal.

In practice, the foregoing factors loom large. For instance, Abraham Lincoln made it plain he would ignore any judicial decree that clashed with his understanding that the Constitution implicitly allowed the President to do anything necessary to save the Union.[34] The Court upheld his unilateral blockade of Confederate ports and seizure of all merchant vessels there—actions Congress later specifically approved—despite the taking of property without due process.[35] By contrast, a year after the Civil War had ended and the politically inept Andrew Johnson had become President, the Court granted a writ of habeas corpus to an American citizen who had been sentenced to death by a military tribunal and who successfully argued that the Constitution gave him the fundamental right to an ordinary jury trial.[36] In the twentieth century, this pattern recurred. The Court dared not confront Franklin Roosevelt—who enjoyed immense popular and congressional support—when he took constitutionally dubious steps to resolve the epic crisis of World War II, but struck down similar actions by his politically weaker successor Harry Truman during the Korean War.[37]

---

32 *See* Goldsmith & Sunstein, *supra* note 8, at 271 (noting that "[t]he public supported the Bush Military Commission proposal by a greater than 2-1 margin"). *But see id.* at 262, 271–74, 281 (describing the different attitude of the legal, political, and media elite, who reflect the post-Vietnam and Watergate distrust of executive actions that threaten civil liberties and a strong commitment to individual rights).

33 *See infra* notes 115–27, 138, 149–53, 177 and accompanying text.

34 *See infra* Part II.B.1.

35 *See* The Prize Cases, 67 U.S. (2 Black) 635 (1863), discussed *infra* notes 100–09 and accompanying text.

36 *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 118–27 (1866), examined *infra* notes 117–22 and accompanying text.

37 *See infra* notes 131–53, 163–78 and accompanying text (analyzing the major cases); *see also* CHRISTOPHER N. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918, at 256–75 (1989) (contending that federal courts often have appropriately delayed decisions until after wartime emergencies have ended, thereby facilitating a more sober evaluation of the legal issues, increasing the likelihood that relevant information can be disclosed without threatening the military effort, and reducing the danger of defiance by a President who has popular backing).

In short, the rigor of judicial review waxes and wanes depending upon the context of each case. Against this historical backdrop, it would be premature to conclude that the four recent "enemy combatant" decisions portend a permanent shift to heroic judicial defense of individual rights against government overreaching in waging war. Rather, it is more likely that these cases eventually will be grouped with others in which the Court seized opportunities to vindicate legal rights against politically vulnerable Presidents in perceived nonemergency situations. Commentators who have lionized the Justices for their "courage" in thwarting George Bush fail to grasp that "kicking 'em when they're down" exhibits no bravery and that this Court (like its predecessors) would be unlikely to stand up to a popular President in the midst of a major war.

The aforementioned ideas will be developed in four parts. Part I examines the original meaning of the constitutional provisions on war powers. Part II explains the Court's ad hoc balancing of multiple legal and political factors, which usually—but not always—results in upholding the government's actions. Part III places the recent cases involving "enemy combatants" within that tradition. Part IV argues that the Court has properly declined to exercise ordinary judicial review in the national security context. Rather, the Justices have recognized that separation of powers counsels extraordinary deference because military decisions are (1) peculiarly within the institutional competence of Congress and the President, and (2) matters of paramount national importance for which elected officials will be held accountable. Accordingly, it is inevitable that the Court will be influenced not merely by abstract legal principles but also by pragmatic political considerations. Nonetheless, such political realities need not induce the Court to uphold *on the merits* presidential measures that are plainly unconstitutional, such as Roosevelt's incarceration of Japanese-Americans. When a politically powerful President has made an irreversible decision in seeming violation of a particular constitutional provision because he believes doing so is essential to the war effort, and when he will likely defy any judicial order to desist, the Court should not affirmatively legitimate such conduct. Rather, it should either decline to review the case altogether or employ a jurisdictional avoidance mechanism such as the political question doctrine, thereby shifting responsibility solely to elected officials. With this one exception, I would leave the Court's jurisprudence largely intact.

I. THE ORIGINAL CONSTITUTIONAL FRAMEWORK

The Constitution on its face neither authorizes nor prohibits federal judges from deciding legal challenges to the exercise of war powers. Nonetheless, the most logical inference from the available textual, structural, and historical evidence is that such judicial review would be extremely limited.[38]

---

38 In previous work, I have used a Neo-Federalist methodology, which recovers the original meaning, intent, and understanding of the Constitution's text, structure, and political theory in order to illuminate modern constitutional issues. *See, e.g.*, Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 397–99, 454, 470–72 (1996) [hereinafter Pushaw, *Justiciability*]; Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695, 697–99 (2002). This analytical framework cannot easily be applied to military affairs, however.

As originally designed, the Constitution (1) granted all powers to initiate and prosecute war to Congress and the President, and (2) authorized the judiciary, in litigated cases, to examine executive actions to ensure that they complied with federal statutes and other government acts to determine whether they comported with the Constitution. Unfortunately, neither the Constitution's text nor its drafting and ratification history contain any direct evidence on the specific question of whether, and to what extent, courts can review the political branches' exercise of war powers. To solve this problem, I try to draw the most plausible inferences from the Constitution—attempting to give effect to all of its provisions—and from its underlying structure and political philosophy, as confirmed by early practice and precedent. *See* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 738–44, 822–43 (2001) [hereinafter Pushaw, *Inherent*] (using this approach to ascertain the contours of inherent federal judicial authority). This inquiry reveals that the Constitution almost surely did not contemplate judicial review of issues concerning the commencement or conduct of war, but likely permitted review of claims that the exercise of military powers violated individual legal rights—albeit with greater deference to the political branches than would be shown in purely domestic affairs.

Subsequent history has demonstrated, however, that the Court has been unable to define the precise scope of appropriate deference in a legally principled way. Instead, it has decided cases based upon their particular facts and circumstances in light of political and practical considerations. My main goal is to provide an honest description and analysis of this precedent. In attempting to identify the nonlegal factors that have influenced the Justices, I owe an intellectual debt to legal realists, to scholars who have applied decisionmaking psychology to adjudication, and to political scientists who have shown that judges seek to rationally maximize their policy preferences and engage in strategic behavior with other government officials. For a discussion of such work, see Tracey E. George & Robert J. Pushaw, Jr., *How Is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1273–76 (2002) (reviewing MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS (2000)); Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319, 338–40 (2005) [hereinafter Pushaw, *Congress*].

In short, although a Neo-Federalist perspective yields some valuable insights about judicial review of war powers, it does not supply workable legal rules that courts

Although the Constitution does not contain a specific clause providing that courts can determine whether political officials have complied with the document's requirements, such power flows from the Constitution's structure and political theory.[39] As Alexander Hamilton explained in *The Federalist No. 78*, only federal judges, who had been appointed through a selective process and guaranteed independence, could be fully trusted to exercise the "judicial power" of deciding cases according to the law—including the supreme and fundamental law of the sovereign People, the Constitution.[40] Moreover, he stressed that the judiciary alone could impartially ascertain whether the elected branches had obeyed the written limits on their own power and had not violated individual legal rights.[41] In short, Hamilton asserted that the Constitution created a "natural presumption" favoring judicial review.[42] Nonetheless, he recognized that this presumption could be rebutted by "particular provisions in the [C]onstitution" that gave Congress or the President ultimate decision-making authority.[43]

Although *The Federalist No. 78* did not list examples of such political questions, Hamilton's related essays (and the writings of other leading Federalists) indicate that the actual process of making war and peace could not be examined judicially. Military powers, which in England had been committed entirely to the royal executive (except

---

can apply impartially and consistently. Indeed, the failure of conventional legal analysis in this area seems to be intractable and universal, as reflected in Cicero's maxim that "during war law is silent." *See* Epstein et al., *supra* note 17, at 3.

Outside of the unique context of military affairs, however, I cling to the belief that federal courts can, and should, formulate and apply rules of law rooted in the Constitution's text, structure, history, and early precedent. *See* Pushaw, *Congress*, *supra*, 338–53.

39 For a detailed explanation of this point, see Pushaw, *Justiciability*, *supra* note 38, at 407–35.

40 *See* THE FEDERALIST No. 78, at 522–29 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). For similar claims, see 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 445–46, 478–81, 489 (Jonathan Elliot ed., 2d. ed. 1891) [hereinafter DEBATES] (James Wilson); 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 73–78 (rev. ed. 1937) (James Madison).

41 *See* THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 40, at 524–27; *see also* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 492, 496–502 (1994) (documenting that most other Founders shared Hamilton's understanding that independent courts would exercise judicial review).

42 *See* THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 40, at 524–25.

43 *Id.*; *see also* Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1196–200 (2002) (recommending that the Court resurrect Hamilton's approach).

for funding the armed forces),[44] were in the American Constitution distributed between Congress and the President.[45] Article I authorizes Congress to provide for the common defense,[46] declare war,[47] "raise and support" the army (subject to a two-year time limit on any appropriation),[48] "provide and maintain a Navy,"[49] regulate the land and naval forces,[50] oversee the President's prosecution of the war,[51]

---

44 *See* MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 6, paras. 61–62 (David Wallace Carrithers ed., Thomas Nugent, trans., Univ. of California Press 1977) (1798) (arguing that the executive should have full control over military operations, with the legislative check limited to terminating funding); Yoo, *Continuation*, *supra* note 12, at 212–17 (describing the king's power to declare war, regulate the army and navy, and execute treaties, as well as Parliament's ability to curb unwanted military action through its control over the purse). Locke claimed that the executive, in an emergency, could "act according to discretion for the public good, without prescription of the law, and sometimes even against it" because the legislature was too slow and numerous to take effective measures. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 81–82 (J.W. Gough ed., Basil Blackwell 1966) (1690).

45 *See* THE FEDERALIST No. 69 (Alexander Hamilton), *supra* note 40, at 465 (noting that the Constitution grants the President one traditional executive power—directing the armed forces—but not others such as declaring war and regulating the armed forces); *see also* Pushaw, *Justiciability*, *supra* note 38, at 401, 430–31, 507–09 (discussing this allocation of military power between Congress and the President as reflecting an overarching purpose of balancing efficiency against the need for government responsibility and protection of liberty); Sunstein, *supra* note 22, at 52, 66–68 (contending that the Constitution's text and history refute the assertion that the President alone protects national security).

46 U.S. CONST. art. I, § 8, cl. 1.

47 *Id.* art. I, § 8, cl. 11. The drafters substituted the word "declare" for "make," thereby clarifying that the President would conduct military operations after war had begun and would retain the traditional executive power to meet sudden attacks. *See* FARRAND, *supra* note 40, at 318–19 (citing, among others, Madison, Elbridge Gerry, and Rufus King).

48 U.S. CONST. art. I, § 8, cl. 12. The Framers inserted this deadline to force Congress to consider whether a war should continue rather than allowing Congress to give the President permanent funding for armies at his command. *See* THE FEDERALIST No. 26 (Alexander Hamilton), *supra* note 40, at 168–71.

49 U.S. CONST. art. I, § 8, cl. 13. Furthermore, Congress can organize the militia and provide for calling it forth to enforce federal laws, suppress insurrections, and repel invasions. *Id.* cls. 15–16.

50 *Id.* art. I, § 8, cl. 14. Congress also has power to define and punish piracies and "offenses against the law of Nations." *Id.* cl. 10.

51 Article I's grant of "legislative power" has always, and properly, been construed as including the traditional function of monitoring the executive. *See, e.g.*, WILLIAM BLACKSTONE, 1 COMMENTARIES *155 (describing Parliament's power to investigate the King's officials and hold them responsible for their actions); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 224–33 (1989) (detailing Congress's interaction with President Washington regarding military affairs, including various oversight activities).

and suspend the writ of habeas corpus when an invasion or rebellion imperils the public safety.[52] Article II makes the President the repository of "executive power"[53] and the "Commander in Chief."[54] The Framers thereby established a unitary executive with the singular institutional capacity for taking quick, energetic, decisive action based on the informed advice of subordinate officials.[55] These qualities were especially important in military affairs[56]:

> Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms [a] usual and essential part in the definition of the executive authority.[57]

The Constitution did not describe the existence (much less the parameters) of the President's power to proceed absent a formal dec-

---

52 "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. Although this clause does not explicitly state that "Congress" alone can suspend habeas, this interpretation seems unavoidable given the placement of this provision in Article I (which pertains exclusively to Congress) and longstanding English practice. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 91–92, 101 (1807).

53 U.S. CONST. art. II, § 1, cl. 1. The President also has a correlative duty to "take Care that the Laws be faithfully executed." *Id.* art. II, § 3. Scholars have suggested that this clause repudiated the Lockean notion of an executive prerogative to act without (or even contrary to) legislation. *See, e.g.*, EDWARD S. CORWIN, THE PRESIDENT 7–8, 286–87 (Randall W. Bland et al. eds., 5th rev. ed. 1984).

54 U.S. CONST. art. II, § 2, cl. 1. Clause 2 authorizes the President to "make treaties," which become effective upon ratification by two-thirds of the Senate. In this Article, I do not analyze such nonmilitary foreign affairs powers, except to note their obvious connection to the protection of national security. *See* Powell, *supra* note 12, at 564–66.

55 *See* THE FEDERALIST No. 70 (Alexander Hamilton), *supra* note 40, at 471–73 (contrasting the "[d]ecision, activity, secrecy, and dispatch" of the single executive magistrate with the deliberateness, conciliation, and public nature of the multi-member legislature); *see also* DEBATES, *supra* note 40, at 447 (James Wilson) (same); THE FEDERALIST No. 64 (John Jay), *supra* note 40, at 434–36 (stressing that the President could negotiate treaties because of his ability to act quickly based upon information that was often confidential).

56 *See* THE FEDERALIST No. 70 (Alexander Hamilton), *supra* note 40, at 471 ("Energy in the Executive . . . is essential to the protection of the community against foreign attacks . . . ."); *id.* at 476 (same).

57 THE FEDERALIST No. 74 (Alexander Hamilton), *supra* note 40, at 500; *see* Powell, *supra* note 12, at 568–74 (explaining that the President, as Commander in Chief, has power to deploy troops and to conduct and control military operations).

laration of war or similar authorization,[58] and scholars have heatedly debated this issue.[59] As a practical matter, however, Presidents have long asserted power to take military action unilaterally, and indeed have become dominant in this area.[60] Nonetheless, Congress can

58 Even supporters of robust congressional war power concede that the President has independent authority to respond to sudden attacks. *See, e.g.*, John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1388 (1988). For instance, Professor Monaghan rejects assertions of broad inherent presidential power as Chief Executive and Commander in Chief, but acknowledges a narrow residual authority to act immediately in a genuine national emergency and only later seek congressional approval. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 9–11, 24–38 (1993); *see also id.* at 11, 61–74 (recognizing a similarly limited executive power to protect United States personnel, property, and instrumentalities).

59 The prevailing view is that the Constitution granted Congress exclusive power "to declare war" or otherwise authorize the use of military force, but that Congress has failed to guard this prerogative from presidential encroachment. *See, e.g.*, ELY, *supra* note 11, at 3–10; FISHER, PRESIDENTIAL WAR POWER, *supra* note 11, at 14–15; *see also* Michael Stokes Paulsen, Youngstown *Goes to War*, 19 CONST. COMMENT. 215, 239–41 (2002) (maintaining that Congress alone has power to initiate war, and that only the President can conduct that war); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1609–35 (2002) (arguing that Congress can "declare war" by either formal proclamation or military assault and that the President cannot initiate "war" without legislative approval, but that the President unilaterally can defend the nation against attack and use military threats and force that fall short of creating a state of "war").

By contrast, Professor Yoo has claimed that the Constitution does not establish any particular process for initiating war (as it does for enacting statutes and ratifying treaties), but rather confers on Congress and the President all military powers and allows them to work out the details. *See* Yoo, *Continuation*, *supra* note 12, at 173–74, 241, 252–64, 288–90, 295–96, 300, 305; Yoo, *War*, *supra* note 12, at 1662–84. Therefore, the President can begin and manage the war as part of his authority as Commander in Chief and his executive power, subject to congressional control through appropriations and impeachment. *See* Yoo, *Continuation*, *supra* note 12, at 174, 196–97, 218, 241–90, 295–96, 300, 305; Yoo, *War*, *supra* note 12, at 1658–59, 1665, 1674, 1680–83. Professor Yoo asserts that the Declare War Clause merely gave to Congress the "juridical" power of determining whether we were at war with another nation, thereby triggering the international laws of war and domestic constitutional military authority. *See* Yoo, *Continuation*, *supra* note 12, at 204–06, 242–50, 288, 295; Yoo, *War*, *supra* note 12, at 1667–73, 1679.

60 *See* Sunstein, *supra* note 22, at 68; *supra* note 11 (citing numerous academics who have also recognized, and criticized, this development). Professors Bradley and Goldsmith maintain that neither the Framers nor any Presidents have believed that using military force required a prior congressional declaration of war, as evidenced by America's involvement in hundreds of undeclared wars dating back to the beginning of the Republic. Bradley & Goldsmith, *supra* note 11, at 2057–62.

check the executive's military adventurism in many ways—most obviously, by allowing funding to lapse or otherwise cutting it off.[61]

Regardless of the precise allocation of war powers between Congress and the President, the pertinent point is that these two departments alone were given all the tools necessary to form, support, and direct the military. In the words of Hamilton:

> These powers ought to exist without limitation: Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defence.[62]

Correspondingly, the Constitution excludes the judiciary from making, executing, or reviewing decisions such as going to war, con-

---

61 *See supra* notes 48, 59 and accompanying text. Article I, Section 8, Clause 12 of the Constitution restricts any appropriations "[t]o raise and support armies" to a two-year term. When that period expires, funding automatically ceases, and the President must await new appropriations. Moreover, Congress's general spending power includes discretion to refuse to provide financial support at all, to approve funding for less than two years, or to repeal a previous statutory appropriation. The Constitution's two-year appropriations limit and its entrusting of the power of the military purse to Congress reflects an obvious purpose to avoid the permanent financing of standing armies at the President's disposal, which struck the Framers as an invitation to tyranny. *See supra* note 48 and accompanying text.

For better or worse, it would be impossible to implement this precise original understanding today. The American people and their government long ago concluded that national security demanded a large, continuously funded military so that the President can respond swiftly and decisively to emergencies. *See* Yoo, *Continuation*, *supra* note 12, at 299–300. Particularly after Pearl Harbor and 9/11, it would be quixotic to argue that the President should always await special congressional fiscal allocations before he can defend the country.

Of course, Congress can express its disagreement with the President's conduct of a war by reducing or terminating funding for it (or by decreasing the size of the armed forces themselves). Conversely, congressional appropriations for the military are a form of authorization to the President to wage war. *See* Note, *Recapturing the War Power*, 119 HARV. L. REV. 1815, 1816–21 (2006).

62 THE FEDERALIST No. 23 (Alexander Hamilton), *supra* note 40, at 147; *see also* THE FEDERALIST No. 41 (James Madison), *supra* note 40, at 270 (emphasizing that even peaceful nations must be prepared to meet the unforeseen ambition of another country).

ducting military operations, funding them, and negotiating with the enemy.[63]

Unfortunately, the Framers and Ratifiers never mentioned what would happen if someone challenged the exercise of war powers not as inconsistent with Articles I or II, but rather as violating his or her individual legal rights. Perhaps they thought that military affairs inherently involved political questions in all circumstances. Conversely, it is possible that they contemplated regular judicial review whenever individual rights were at stake. The most reasonable conclusion, however, is that the Founders would have sought to give effect both to the Constitution's provisions designed to protect national defense and to its institution of judicial review. The Supreme Court has achieved this goal by adopting the compromise approach of taking jurisdiction but showing healthy deference to the political branches.[64]

---

63 *See* Yoo, *Continuation*, *supra* note 12, at 176–82, 269–70, 284, 287–90, 295–96, 300 (demonstrating that the extensive Convention and Ratification debates contain no suggestion that federal courts could or would review the exercise of war powers by Congress or the President, who were given complete authority in this area and were expected to check each other); *see also* Pushaw, *Justiciability*, *supra* note 38, at 507–08 (contending that the Constitution's scheme of shared legislative-executive power over warmaking impliedly excluded the judiciary).

Thus, I agree with the Court's consistent refusal to decide political questions involving whether the President can use military force in the absence of a declaration of war or other congressional authorization. *See infra* Part II. Conversely, I reject Dean Koh's argument that federal courts should vigorously review executive branch assertions of warmaking power in order to restore the proper constitutional balance in making decisions about national security. *See* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

The judiciary's only explicit constitutional role in the military context was to conduct impartial treason trials involving persons accused of "levying war" against the United States or "adhering to their Enemies, giving them Aid and Comfort." U.S. CONST. art. III, § 3. For an illuminating recent analysis of this provision, see Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863 (2006) (maintaining that this clause guarantees a criminal trial in an ordinary federal court to persons subject to the law of treason—a category that includes both American citizens and aliens present in the United States who are not accompanying an invading military force). As originally understood, this Treason Clause may have limited the ability of the political branches to deprive alleged traitors of this judicial forum and instead remit them to military jurisdiction.

64 For a defense of the Court's position, see Yoo, *supra* note 19, at 428–31, 433–36, 440, 450–51; *see also* Sunstein, *supra* note 22, at 66 ("Structural concerns, along with simple prudence, argue in favor of considerable judicial deference to presidential choices when national security is at risk."). Two other scholars have provided especially insightful explanations of the Court's approach.

II. JURISPRUDENCE ON WAR POWERS

A. *The Marshall Court*

In *Marbury v. Madison*,[65] Chief Justice Marshall simultaneously announced the power of judicial review[66] but recognized certain questions to be "political,"[67] including the President's conduct of military affairs and his foreign policy decisions that did not transgress individual rights.[68] The Marshall Court also deemed nonjusticiable several

---

First, Professor McGinnis has argued that, for constitutional and political reasons, the President has the strongest interest in war powers, whereas the judiciary places the least value on this subject because it lacks the institutional capacity to make sound assessments and because an incorrect decision would have dramatic effects that would harm its prestige. John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS., Autumn 1993, at 293, 305–08, 316–18. He finds it unsurprising that courts have tended to defer to the President's military decisions and leave the primary checking role to Congress, thereby maximizing their power over the area they care about most—protecting individual rights in domestic cases. *See id.* at 293–94, 306–08, 316–18.

Second, Professor Nzelibe applauds the federal judiciary's abstention from deciding constitutional questions about the allocation of foreign-affairs powers on the ground that courts have peculiar institutional disadvantages in this area compared to the political branches, such as a lack of resources to track the evolution of international norms and an absence of authoritativeness and legitimacy in determining matters of foreign policy. *See* Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 944–45, 975–99 (2004). He does recognize, however, that judicial review may be justified when a decision about foreign affairs affects individual rights or domestic property, although even then courts properly show substantial respect for the judgments of the political departments. *See id.* at 999–1006.

For an opposing view, see Kalyani Robbins, *Framers' Intent and Military Power: Has Supreme Court Deference to the Military Gone Too Far?*, 78 OR. L. REV. 767, 776–81 (1999) (contending that the Constitution's inclusion of specific provisions that recognize the need for deference to the military in cases of urgent necessity, such as the Suspension Clause, implies that courts should enforce all other constitutional rights that are not so expressly limited).

65 5 U.S. (1 Cranch) 137 (1803).

66 *Id.* at 176–80.

67 *Id.* at 169–71.

68 *Id.* at 166–67. *See* Yoo, *supra* note 19, at 432–33 (making this point to rebut the argument that it is inconsistent to endorse judicial review yet deny its applicability to cases involving war initiation). Indeed, a decade before *Marbury*, the Justices declined to render an advisory opinion on legal questions stemming from America's neutral status in the war between England and France—a decision driven both by constitutional interpretation and by a desire to avoid direct judicial involvement in the struggle between Congress and the executive over control of foreign relations. *See* Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473 (1997) (book review).

congressional powers, such as declaring war[69] and determining the rights of foreigners during wartime.[70] The Chief Justice repeatedly stressed that such political decisions about military matters affected the entire country, and that therefore any disputes could be resolved only through the national political process (i.e., appealing to Congress or the President to change their policies and, if they failed to do so, electing different officials).[71]

The Court's most detailed analysis came in *Martin v. Mott*,[72] in which it refused to reach the merits of the President's decision to call forth the militia to defend against what he concluded was a credible threat of invasion.[73] This holding reflected three concerns. First, Congress had exercised its Article I powers by granting the President sole discretion to determine whether an emergency justified enlisting the help of the militia.[74] Second, he had to base military decisions on information that was often confidential and on evidence that might be inadmissible in court.[75] Third, the President as Commander in Chief could not be forced to disclose the facts supporting his decision to a judge or jury for possible second-guessing.[76] Rather, his actions were subject only to the political scrutiny of the electoral process and congressional oversight.[77]

Despite these "political question" rulings, however, the Marshall Court remained open to hearing allegations that the President, in exercising his war powers, had breached a legal duty in a way that violated the claimant's rights. The earliest cases arose when Congress, instead of declaring a "general" war against Revolutionary France and thereby triggering the full range of executive authority, approved only "partial" armed hostilities limited to certain objectives, places, and times.[78] For instance, in *Little v. Barreme*,[79] the Court concluded that

---

69 *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 29 (1801).

70 *See* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 634–35 (1818).

71 *See, e.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 197; *Marbury*, 5 U.S. (1 Cranch) at 164–71.

72 25 U.S. (12 Wheat.) 19 (1827).

73 *Id.* at 28–33. In *Martin*, a citizen who had been fined for refusing to report for military duty claimed that a genuine emergency did not exist that would have justified recruiting the militia. *Id.* at 23–24, 29–33.

74 *Id.* at 28–32.

75 *Id.* at 31.

76 *Id.* at 30–33.

77 *Id.* at 32.

78 *See, e.g.*, Bas v. Tingy, 4 U.S. (4 Dall.) 37, 45–46 (1800) (using this distinction to find that a state of "war" existed between America and France, despite the absence of a formal declaration). The definitive study is ALEXANDER DECONDE, THE QUASI-WAR:

the President did not have Article II power to exceed Congress's explicit directive to seize ships going "to" French ports by ordering the capture of ships going "to [and] *from*" France.[80] The Court therefore held that an American officer who had relied upon that faulty executive order in forcibly taking a Danish ship had to pay damages to the shipowner.[81] Even then, however, the Court acknowledged the political branches' vast authority in this field.[82]

As is true in most areas of constitutional law, the Marshall Court established an analytical framework that has proved enduring, even as details have continued to evolve. Generally speaking, military actions

---

THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801, at 124–30 (1966).

79 6 U.S. (2 Cranch) 170 (1804).

80 *Id.* at 176–79.

81 *Id.* at 179.

82 *See id.* at 177–79 (emphasizing the President's broad powers in directing military officers and his independent authority to meet emergencies, but suggesting that Congress could specify the parameters of the exercise of executive war powers); *see also Bas*, 4 U.S. (4 Dall.) at 37–40 (concluding that Congress's hostile conduct towards France—for example, cutting off diplomatic relations and funding military actions against that nation—made France an "enemy" as that word was used in a 1799 federal law that gave United States commanders a bonus if they recaptured American merchant ships from "enemies"); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 7–8, 44–45 (1801) (applying a similar analysis in upholding the seizure of a ship pursuant to a statute). In both *Bas* and *Talbot*, the Court disclaimed any independent power to determine whether a state of war existed (a legislative prerogative), but rather asserted that it was merely following Congress's guidelines. To similar effect is *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), which held that Congress's general authorization to the President to wage the War of 1812 did not include the specific power to seize persons or confiscate enemy property located in the United States. *Id.* at 122–27; *see* Corn, *supra* note 26, at 205–12 (interpreting these early decisions as establishing that the executive branch cannot lawfully act contrary to the express will of Congress in authorizing and regulating armed conflict).

Professor Wuerth has argued that in *Little* and in "War of 1812" cases like *Brown*, courts refused to defer to executive claims of inherent constitutional authority to imprison American citizens, no matter how compelling the military necessity. Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1568–69, 1580–93 (2004). She maintains that this precedent, and many subsequent decisions, direct judges to require specific congressional authorization for the detention of citizens—including those held as enemy combatants in the War on Terrorism. *See id.* at 1607–15; *see also id.* at 1610 (contending that, even when the President acts under a statute, a court must determine whether his conduct comports with the Constitution and international law). Although Professor Wuerth has done admirable historical analysis, I disagree with her conclusion that the War of 1812 cases survived the Supreme Court's approval of the President's detention and trial of citizens during the Civil War and World War II. *See infra* Parts II.B–D.

per se are treated as political questions.[83] When such decisions allegedly violate individual rights, however, courts have exercised judicial power, albeit with keen sensitivity to the government's legitimate prerogatives.[84] The amount of deference depends on the particular context of each case, although a few considerations have emerged as consistently important. Examination of the main decisions helps to isolate those factors.

B. The Civil War Era

The Civil War and Reconstruction transformed the constitutional landscape. Most pertinently for present purposes, Lincoln success-

83 The seminal case is *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). There the Taney Court declined to entertain a claim that Rhode Island's government, which had been in existence since receiving a colonial charter in 1663, did not have a "republican form" because it had not been established pursuant to a popular Convention that created a truly representative legislature, as had the upstart government that brought the suit. *Id.* at 34–45. This holding rested on two considerations. First, Congress had recognized the charter government as the legitimate one, and the President (with statutory authorization) had taken measures to call out the militia to suppress the rival government. *Id.* at 42–45. Second, overturning these decisions would result in voiding all the acts of Rhode Island's charter government, which would create political and legal chaos. *Id.* at 38–39. In other cases, however, the Court decided questions that seemed political. *See, e.g.*, Fleming v. Page, 50 U.S. (9 How.) 603, 614–15 (1850) (ruling that the President, absent congressional approval, could not annex conquered territory to the United States).

84 For a relatively rare example of a successful suit, see *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 133–35 (1851) (invalidating an army officer's seizure of private property during the Mexican War where no congressional authorization existed and no emergency justification had been shown); *see also* CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 17 (1976) (concluding that the Court usually defers, but occasionally "afford[s] a grievously injured citizen relief from a palpably unwarranted use of presidential or military power"); Theodore Y. Blumoff, *Judicial Review, Foreign Affairs and Legislative Standing*, 25 GA. L. REV. 227, 259–62, 269–74, 283–92, 304–05, 326–27 (1991) (documenting the Court's adjudication of numerous cases touching on foreign policy when the plaintiff claimed a violation of individual rights, but noting its application of lenient standards, such as accepting as the controlling law the legal interpretation previously made by political officials); *cf.* Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795, 796–97, 815, 852 (2004) (arguing that judicial deference is appropriate only in the case of "a truly military decision" such as a battlefield directive, and not when a President such as George Bush makes an unsupported assertion that a "war" power must be exercised in seeming violation of a constitutional right).

fully asserted sweeping presidential authority that seemed to run afoul of several constitutional provisions.[85]

1. Lincoln's View of the Constitution During Wartime

The President responded swiftly to the assault on Fort Sumter in April 1861 by unilaterally ordering a blockade of Confederate ports and the summary seizure of all merchant vessels (and their cargoes) within the forbidden zone—even against shipowners who were unaware of the blockade.[86] With similar boldness, Lincoln suspended the writ of habeas corpus,[87] even though the Constitution lodged that power in Congress.[88] Likewise, Lincoln banned disloyal speech and publications despite possible First Amendment concerns[89] and established military tribunals with broad jurisdiction.[90] Especially breathtaking was Lincoln's claim that his power as Commander in Chief allowed him to free all the slaves in rebellious areas,[91] a policy judgment that appeared to be quintessentially legislative[92] (not to mention

85 *See* DANIEL FARBER, LINCOLN'S CONSTITUTION 7–8, 15–25, 115–95 (2003) (detailing such drastic measures but generally defending their legitimacy); MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1993).

86 These actions, which appeared to violate the Fifth Amendment, were upheld in *The Prize Cases*, 67 U.S. (2 Black) 635, 665–82 (1862), discussed *infra* notes 100–09 and accompanying text.

87 *See Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (Taney, C.J.) (describing and condemning this suspension).

88 *See supra* note 52 and accompanying text (analyzing habeas corpus). Lincoln ordered the detention of thousands of civilians without trial. *See* FARBER, *supra* note 85, at 19–20, 144, 157; NEELY, *supra* note 85, at 113–38.

89 *See* FARBER, *supra* note 85, at 17, 118, 144, 164, 170–74 (citing numerous examples).

90 *See id.* at 8, 20, 144–46, 163–75; *see also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2831–34 (2006) (Thomas, J., dissenting) (describing Lincoln's military commissions). Lincoln also expanded the military, called for volunteers, and committed millions of dollars to the war effort, despite the Constitution's delegation of such powers to Congress. *See* FARBER, *supra* note 85, at 17–18, 117–20, 132–33, 135–38, 192, 196–97.

91 *See* PHILLIP SHAW PALUDAN, THE PRESIDENCY OF ABRAHAM LINCOLN 187–89 (1994).

92 The Emancipation Proclamation made concrete Lincoln's earlier statements that, as President, he would not obey the Court's constitutional interpretation in *Dred Scott*. *See* Mark Tushnet, *The Supreme Court, the Supreme Law of the Land, and Attorney General Meese: A Comment*, 61 TUL. L. REV. 1017, 1022 (1987). Even Justice Curtis, an ardent Unionist who had resigned from the Court to protest *Dred Scott*, lamented that Lincoln had exceeded his Article II powers with the Emancipation Proclamation and some of his other actions. *See* 2 A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D. 306–35 (Lawbook Exch., Ltd. 2002) (1879); *cf.* FARBER, *supra* note 85, at 19, 21, 144–45, 152–57 (conceding the extraordinary nature of this Proclamation, noting that it

beyond the federal government's authority according to *Dred Scott v. Sandford*[93]).

Chief Justice Taney and a minority of his colleagues attempted to check Lincoln through a formal interpretation of the Constitution. The majority of Justices, however, pragmatically adopted a hands-off approach.

The first major case was *Ex parte Merryman*,[94] in which Taney tried to thwart Lincoln's suspension of habeas corpus on two grounds. First, the placement of the Suspension Clause in Article I and historical practice revealed that Congress alone had this power.[95] Second, Article III courts had a vital role in vindicating the due process rights of citizens who had been unlawfully detained—including Merryman, who had been summarily thrown into a military prison for his Confederate leanings.[96] Lincoln disregarded Taney's order to release Merryman and instead told Congress that the Constitution implicitly permitted the President to do anything he deemed necessary to save the Union.[97] He famously asked: "Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated"?[98] Two years later, Congress belatedly ratified Lincoln's suspension of habeas corpus.[99]

---

wiped out millions of dollars in property rights and hence raised grave questions under the Fifth Amendment, but ultimately finding it justified as a war measure).

93 60 U.S. (19 How.) 393 (1856).

94 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (Taney, C.J.).

95 *Id.* at 148–52.

96 *Id.* at 147–49, 152–53.

97 *See* REHNQUIST, *supra* note 10, at 38–39 (quoting Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 6 COMPLETE WORKS OF ABRAHAM LINCOLN 297, 309 (John A. Nicolay and John Hay eds., 1905)); *see also* FARBER, *supra* note 85, at 188–89 (noting that *Merryman* is the only instance of a President disobeying a direct court order); LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 260–61 (4th ed. 1997).

98 *See* REHNQUIST, *supra* note 10, at 38. The Constitution provides that the habeas writ "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. Lincoln's argument that this Clause did not expressly say whether "Congress" or "the President" could suspend the writ, and that therefore he could do so, conflicts with the Constitution's structure, history, and precedent. *See supra* note 52 and accompanying text. Far more supportable is Lincoln's claim that the President can take an otherwise unlawful action if necessary to preserve the entire constitutional government. *See supra* notes 44, 58 and accompanying text; *infra* note 109. For example, *Merryman* involved Lincoln's suspension of habeas between Washington and Philadelphia to address the real danger that Maryland would join the Confederacy, which would have cut off the federal government from the North and crippled the Union. *See* FARBER, *supra* note 85, at 16–17, 19–20, 117, 157–63, 192–95.

99 *See* Act of Mar. 3, 1863, ch. 81, 12 Stat. 755.

Unlike Taney, most of the other Justices got the message. In *The Prize Cases*,[100] the Court sustained Lincoln's blockade of Confederate ports and his seizure without due process of all transgressing vessels and their cargoes.[101] The majority held that the President's power as Commander in Chief included unreviewable discretion to "'determine what degree of force the crisis demands,'"[102] such as the deployment of warships to enforce the blockade.[103] Whether Lincoln had acted within the scope of his constitutional duties was "a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted."[104] The Court also rejected the argument that Lincoln had acted unlawfully because Congress had not declared war or specifically authorized his measures, instead creatively interpreting existing federal laws as generally empowering the President to employ the army and navy to quell domestic insurrections.[105] Moreover, the Court maintained that Congress's later approval of Lincoln's order resolved any potential legal problems.[106] Chief Justice Taney joined Justice Nelson's dissent, which contended that Lincoln had lacked constitutional authority to unilaterally order the blockade and seizures and that later congressional endorsement could not cure this unconstitutional usurpation.[107]

The Prize Cases seemingly accepted Lincoln's claim that Article II grants the President virtually unlimited—and judicially unreviewable—power to take any actions he considers essential to address an emergency.[108] Nonetheless, the Court strained to avoid the full impli-

---

100 67 U.S. (2 Black) 635 (1862).

101 *Id.* at 665–82.

102 *Id.* at 670.

103 *Id.* at 666–70.

104 *Id.* at 670.

105 *Id.* at 668 (citing Act of Mar. 3, 1807, ch. 37, 2 Stat. 443; Act of Feb. 28, 1795, ch. 36, 1 Stat. 424). The Court acknowledged, however, that the President had the duty to resist a rebellion or invasion by force without waiting for particular congressional authorization. *Id.* at 668–69. This Article II power to respond militarily to an emergency, however, did not amount to a declaration or initiation of war. *Id.* at 660, 668.

106 *Id.* at 670–71 (setting forth statute).

107 *See id.* at 697–98 (Nelson, J., dissenting, joined by Taney, C.J., and Catron and Clifford, JJ.) (stressing that only Congress, not the President, could determine that a state of war existed).

108 *See* Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691 (2004) (book review) (arguing that Lincoln correctly believed that the President's sworn constitutional duty to "preserve, protect and defend" the entire Constitution (and the nation) supplied a "meta-principle" of interpretation: All actions necessary to save the Union justified the temporary sacrifice of individual con-

cations of this theory by emphasizing Congress's constitutional role, both in generally authorizing Presidents to put down rebellions and in specifically endorsing Lincoln's possibly extra-constitutional measures.[109]

The judiciary's kid-gloves approach continued in *Ex parte Vallandigham*,[110] which involved a constitutional challenge to a sentence imposed by a military commission established by a U.S. Army

---

stitutional provisions whose full enforcement would threaten to destroy the country). As Lincoln put it: "'[M]easures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the [C]onstitution, through the preservation of the nation.'" *See id.* at 721 (quoting Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 585, 585 (Dan E. Fehrenbacher ed., 1989)).

109 Some scholars have contended that Article II does not grant the President bottomless implied authority to resolve national crises. *See supra* note 58 (citing Professors Ely and Monaghan). Rather, executive actions such as those taken by Lincoln are unconstitutional, and the President must later request Congress's approval—and can be held accountable through impeachment or other sanctions if Congress determines that the President lacked justification for his actions. *See* FISHER, PRESIDENTIAL WAR POWER, *supra* note 11, at 263; Note, *supra* note 61, at 1829–30 n.83. Indeed, even Lincoln conceded that many of his actions were of dubious constitutionality and sought later endorsement of them from Congress. He also understood that only Congress could appropriate the funds necessary to wage the war successfully. *See* FARBER, *supra* note 85, at 18–19, 24, 118, 137–45, 192–95, 197 (acknowledging that the President must have some independent ability to defend the nation in true emergencies, but maintaining that he must remain legally and morally answerable for his conduct to Congress); *see also* David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 174–80, 192–93 (2002) (asserting that Lincoln properly recognized the longstanding Anglo-American principle of "retroactive ratification" whereby the President could break the law in an emergency and then seek congressional approval for his actions). *But see* CORWIN, *supra* note 53, at 23–24, 167 (concluding that Lincoln initially assumed that the validity of his interim emergency measures depended upon later legislative ratification, but that by 1863 he had come to believe that the President had extraordinary independent constitutional authority in wartime).

I reject the notion that Congress can make unconstitutional conduct constitutional. Rather, Article II either does or does not give the President power to respond to a crisis that imperils America. I believe that the Constitution necessarily provides for its own preservation, and that only the President is institutionally equipped to save the nation in such a situation. The reason is structural: Whereas Congress and the courts are in session for fixed periods, the President alone is continuously on duty and thus can immediately deal with sudden attacks and rebellions. Moreover, even if Congress happens to be in session when an emergency arises, its large membership prevents the immediate action that may be necessary to preserve the status quo. For a detailed elaboration of the foregoing thesis, see AKHIL REED AMAR, AMERICA'S CONSTITUTION 131–204, 351–63 (2005).

110 68 U.S. (1 Wall.) 243 (1863).

general in conformity with instructions approved by Lincoln.[111] The Court held that it could not "review or pronounce any opinion upon the proceedings of a military commission"[112] or otherwise judge the actions of the executive branch in such matters.[113] Indeed, Presidents and commanders had used military tribunals without congressional authorization or judicial interference in every significant war dating back to the Revolution.[114]

After Lincoln prevailed in his initial dispute with Taney, the Court did not invalidate any of Lincoln's wartime measures. Rather, it determined either that the issues were nonjusticiable or that the Constitution permitted his actions. The Civil War demonstrated that a President can disregard various provisions of the Constitution if he determines that doing so is necessary to save our entire constitutional form of government, as long as he enjoys congressional support (even retroactively) and he is willing and able to ignore any adverse court judgment.[115]

2. Reconstruction-Era Limits on the Executive

Lincoln named as his Vice President Andrew Johnson, a Southern Democrat who had remained loyal to the Union. When Johnson

---

111 *Id.* at 243, 248.

112 *Id.* at 252; *see also id.* at 253 (ruling that the Supreme Court lacked statutory jurisdiction to hear an appeal from a military commission).

113 *Id.* at 254 (citing Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28–35 (1827)).

114 *See* Yoo, *supra* note 14, at 89–90 (compiling numerous examples). Such military commissions were especially common during the Civil War. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2831–33 (2006) (Thomas, J., dissenting) (citing military records). Interestingly, the Court deferred to Andrew Johnson when he convened a military tribunal to try Lincoln's assassin and accomplices and suspended their right to habeas corpus. *See* ROSSITER, *supra* note 84, at 110–13.

115 *See* ROSSITER, *supra* note 84, at 25 ("So long as public opinion sustains the President, as a sufficient amount of it sustained Lincoln in his shadowy tilt with Taney and throughout the rest of the war, he has nothing to fear from the displeasure of the courts."). Lincoln was an exceptionally able and resolute leader who was passionately committed to preserving the Union, and he received the solid backing of Congress. Nonetheless, it should be noted that in 1860 he received only 40% of the popular vote (59% of the Electoral College), that his popularity waxed and waned along with the Union's fortunes during the Civil War, and that his reelection was in doubt. *See* FARBER, *supra* note 85, at 20, 145–46. Nonetheless, in 1864 he was reelected with 55% of the popular vote (and an overwhelming 91% of the electoral vote). *See* David Leip's Atlas of U.S. Presidential Elections, http://uselectionatlas.org/RESULTS/ [hereinafter David Leip's Atlas] (select "General by Year," then follow 1864) (last visited Jan. 20, 2007). My central point is not that Lincoln was always personally popular, but rather that he was a strong leader with political savvy who displayed a willingness to defy Chief Justice Taney over both habeas corpus and slavery.

became President and pursued Lincoln's conciliatory plan to reconstruct the South, he encountered bitter opposition from the Radical Republicans who controlled Congress and who eventually impeached him.[116] In this political climate, the Justices understandably showed more willingness to confront President Johnson than Congress.

For instance, in *Ex parte Milligan*,[117] the Court granted a writ of habeas corpus to an Indiana citizen who had been found guilty of conspiracy against the federal government and sentenced to death by a military commission.[118] The Court concluded that Milligan had a constitutional right to a regular jury trial because he had never served in the armed forces and because the civil courts in Indiana had always remained open[119]: "[Neither] the President, [n]or any commander under him, without the sanction of Congress, [can] institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels."[120] The Court proclaimed that "the Constitution . . . is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[121] This lofty rhetoric, however, conflicted with the following frank admission:

> During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.[122]

---

116 The classic study is MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 1–5, 89–95 (1973).

117 71 U.S. (4 Wall.) 2 (1866).

118 *Id.* at 107–08, 118–27.

119 *Id.* at 120–21, 127.

120 *Id.* at 139–40 (Chase, C.J., concurring).

121 *Id.* at 120–21 (majority opinion). Four Justices avoided the constitutional questions and instead concluded that the use of a military commission in Milligan's case exceeded the authority granted to the President by Congress. *See id.* at 132–42 (Chase, C.J., concurring).

122 *Id.* at 109 (majority opinion). *See* ROSSITER, *supra* note 84, at 30–39 (asserting that the Court's "lecture" in *Milligan*, issued after Lincoln had died and the emergency had passed, cannot be squared with its capitulation to all of the President's actions during the Civil War—including the creation of military commissions—and has had no impact on future Presidents); *id.* at 39 ("[T]he law of the Constitution is what Lincoln did in the crisis, and not what the Court said later.").

Moreover, the Court did not apply this same logic in two cases challenging the constitutionality of the Reconstruction Acts (passed over Johnson's veto), which established military governments in each Southern state.[123] First, in *Georgia v. Stanton*,[124] the Court invoked the political question doctrine to refuse to hear a claim that enforcement of martial law in Georgia would unconstitutionally abolish the existing state government.[125] Second, *Ex parte McCardle*[126] upheld Congress's power to repeal the Court's appellate jurisdiction in a pending case brought by a petitioner who had been imprisoned for libeling Mississippi's military government and who sought to void the Reconstruction Acts.[127]

Overall, during the Civil War and Reconstruction, the rigor of judicial review seemed to depend more on political than legal considerations. For example, the Court deferred to Lincoln in *The Prize Cases* and to Congress in *Stanton* and *McCardle*, perhaps because it feared that any judgment invalidating their actions would have been ignored. Conversely, the Court's brief shining moment in *Milligan* may have reflected the political vulnerability of the Johnson Administration as much as a desire to vindicate individual constitutional rights through the hallowed writ of habeas corpus.

C. *Two World Wars and Presidential Ascendancy*

Twentieth-century Presidents followed the path blazed by Lincoln. For example, to meet the challenges of World War I, Woodrow Wilson persuaded Congress to enact sweeping legislation instituting a draft, mobilizing domestic resources for the war effort, and effectively suspending the First Amendment.[128] The Court played along. Most notoriously, it sustained federal laws banning both "sedition" (i.e., disloyal or abusive language about federal officials or the military) and "espionage" (including obstruction of military recruit-

123 *See* Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

124 73 U.S. (6 Wall.) 50 (1867).

125 *Id.* at 76–77; *see also* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 497–501 (1866) (declining to determine the constitutional validity of congressional acts or of President Johnson's exercise of discretion, pursuant to those statutes, to use appropriate force in Southern military districts).

126 74 U.S. (7 Wall.) 506 (1869).

127 *Id.* at 508–09, 512–15; *see* Issacharoff & Pildes, *supra* note 20, at 15–17 (arguing that the Court in *McCardle* properly adopted an "institutional process" method focused on congressional policy choices and rejected the "constitutional rights" approach of *Milligan*).

128 *See* ROSSITER, *supra* note 84, at 94–96 (describing the relevant statutes and the Court's decisions upholding them).

ment or enlistment and attempts to cause insubordination, disloyalty, or refusal of duty) on the ground that the government's interest in winning the war outweighed the free speech rights of those who criticized the war (e.g., by encouraging draft resistance).[129] In other cases, the Court held the conduct of foreign relations to be a political question.[130]

Similarly, the Justices capitulated to Franklin Roosevelt's exercise of extraordinarily broad authority over military and foreign affairs. Even before World War II, the Court declared in *United States v. Curtiss-Wright Export Corp.*[131] that "the very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations" did not require express constitutional or legislative authorization.[132] Although *Curtiss-Wright* itself involved military orders by Roosevelt that had been approved by Congress,[133] many of his other pre-war actions had not.[134]

---

129 The seminal case is *Schenck v. United States*, 249 U.S. 47, 51–53 (1919) (rejecting a First Amendment challenge by leafletters who had been convicted under the Espionage Act for obstructing military recruitment and encouraging insubordination); *see also* United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 416 (1921) (validating a provision of the Espionage Act that the Postmaster General invoked to revoke the mailing privileges of an antiwar newspaper); Debs v. United States, 249 U.S. 211, 216–17 (1919) (sustaining the conviction of Eugene Debs under the Espionage and Sedition Acts for criticizing the government's intervention in the war and preventing recruiting). The Court acknowledged that such laws, if they had been applied during peacetime, might well have run afoul of free speech guarantees. *See, e.g.*, *Schenck*, 249 U.S. at 52; *see also* MAY, *supra* note 37, at 1–2, 13–16, 191–253 (contending that the federal government's abusive assertion of "war powers" during World War I and its aftermath led the Court to reassess, and ultimately abandon, its practice of refusing to review the constitutionality of such legislation).

130 *See* Oetjen v. Cent. Leather Co., 246 U.S. 297, 302–04 (1918) (deeming nonjusticiable the government's recognition of the proper sovereign in a foreign country).

131 299 U.S. 304 (1936).

132 *Id.* at 320.

133 *Id.* at 312–13, 333 (upholding Roosevelt's proclamation directing military officers to prevent violation of an arms embargo with certain South American countries, which had been issued pursuant to a joint resolution of Congress granting him discretion over this matter).

134 *See, e.g.*, United States v. Belmont, 301 U.S. 324, 327 (1937) (sustaining the validity of the President's establishment of diplomatic relations with Great Britain and the Soviet Union); *see also* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 110–13 (1973) (noting that, before Congress declared war in 1941, Roosevelt had sent American troops to the North Atlantic, declared a state of "unlimited national emergency," and ordered the Navy to shoot Nazi U-boats on sight).

During World War II, the Court accepted the government's claims that national security justified the suppression of individual rights and liberties. Two cases are especially illuminating.

First, in *Ex parte Quirin*,[135] the Justices construed an ambiguous statute as authorizing the President to use his own military tribunals to try "enemy combatants" for violating the laws of war, thereby avoiding the need to address Roosevelt's assertion that he had independent constitutional power to do so.[136] The Court sustained a tribunal's death sentences imposed on avowed Nazi saboteurs (including one American citizen) who had surreptitiously entered the United States, despite their argument in a habeas corpus petition that the Fifth and Sixth Amendments guaranteed their right to a trial in a civil court with full constitutional protections—not procedures fashioned by the President.[137] The Justices did not mention that Roosevelt had indicated his intent to execute these saboteurs regardless of any contrary judicial order.[138] The Court reaffirmed the validity of military commissions in other cases, most notably *In re Yamashita*.[139]

---

135 317 U.S. 1 (1942).

136 *Id.* at 21–30, 38–39, 45–48. The relevant Act of Congress stated that its provisions describing courts martial "shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions." *Id.* at 27 (citing Arts. 12, 15, 38, 46, 81, 82 of the Articles of War (recodified by Act of May 5, 1950, ch. 169, 64 Stat. 107 (codified as amended at 10 U.S.C. §§ 801–940 (1950))). The Court read this language as a congressional grant of power to the President. *Id.* at 27–28. However, this statute could also have been read (and likely was intended) as recognizing the President's independent authority to use military commissions when allowed by the law of war. *See* Wuerth, *supra* note 82, at 1574 n.55. The Court's clever interpretation provided a convenient way for it to uphold FDR's actions in a situation where attempting to thwart him would have proved futile. *See infra* note 138 and accompanying text.

137 *Quirin*, 317 U.S. at 22–48.

138 *See* Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 SUP. CT. REV. 455, 489–90; *see also* Katyal & Tribe, *supra* note 8, at 1291 ("[S]ome highly questionable ex parte arm-twisting by the executive may have spurred the Supreme Court's unanimous decision."). The public overwhelmingly supported the trial of the saboteurs by military commission, expressed outrage at the Court's decision to intervene, and applauded its snap judgment (issued the day after oral argument) allowing the tribunal to proceed. *See* Goldsmith & Sunstein, *supra* note 8, at 266–67. The Court issued an explanatory opinion months later, after the executions had been carried out. *See* Neal Katyal, *The Changing Laws of War: Do We Need a New Legal Regime After September 11? Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237, 1252–53 (2004).

139 327 U.S. 1, 10–11 (1946). In that case, a military commission used special procedural and evidentiary rules that deviated from ordinary court-martial practice, and it convicted and sentenced to death a Japanese general for war crimes (failing to

Second, in *Korematsu v. United States*,[140] the Court ruled that the executive branch's determination (endorsed by Congress) that Japanese-Americans on the West Coast had to be excluded from coastal areas to prevent espionage and sabotage on behalf of Japan warranted the infringement of their due process and equal protection rights.[141] Recognizing that, absent such a dire emergency, the compulsory evacuation of large groups of citizens from their homes would have violated the Constitution, the Court stated:

> To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily. . . . [T]he need for action was great, and time was short. [The judiciary] cannot—by availing [itself] of the calm perspective of hindsight—now say that at that time these actions were unjustified.[142]

---

prevent his troops from committing atrocities in the Philippines). *Id.* at 5–6. The Court upheld the denial of General Yamashita's habeas petition on the ground that he did not enjoy the protection of Article 38 of the laws of war or the Geneva Conventions of 1929. *Id.* at 7–24. The majority refused to second-guess the President's determination that this military commission was necessary (even though it had been convened after the war had ended) or his choice of procedural rules. *Id.* at 12–13, 18–23; *see also* Brandt v. United States, 333 U.S. 836 (1948) (per curiam) (denying habeas relief to Nazis who had been convicted by a U.S. military tribunal at Nuremberg). *Quirin*, *Yamashita*, and many other cases illustrate that "[t]he Supreme Court of the United States cannot be expected, indeed has no right, to set itself up as a sort of supermilitary commission to oversee the worldwide activities of the punitive tribunals that the President has authorized." ROSSITER, *supra* note 84, at 118–19.

140 323 U.S. 214 (1944).

141 *Id.* at 215–25. General Dewitt issued this specific exclusion order pursuant to Roosevelt's more general Executive Order, which in turn had been ratified by Congress. *Id.* at 215–17.

142 *Id.* at 223–24. Similarly, the Court sustained the conviction of an American citizen of Japanese descent for violating a curfew order issued at the executive's discretion under a broad congressional delegation of power. Hirabayashi v. United States, 320 U.S. 81, 91–94 (1943). According to the Court:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality . . . . We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military

In dissent, Justice Jackson suggested that judges lacked sufficient information to intelligently examine executive claims of military necessity.[143] He then argued that the Court, having asserted jurisdiction, had a duty to strike down this exclusion order because it clearly violated the constitutional rights of citizens of Japanese descent.[144]

The Court did, however, allow an individual to challenge her detention after the forced transfer had taken place. Mitsuye Endo filed a writ of habeas corpus alleging that the government, through its War Relocation Authority (WRA), had violated her due process right to liberty by detaining her without charges and without disputing her claim of patriotism.[145] The Court avoided this constitutional question by holding that Congress had not authorized such imprisonment:

> Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the [statutory] power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.[146]

Nonetheless, *Endo* hardly represents a courageous rebuke to government overreaching, for two reasons. First, Congress had approved and funded the relocation prison camps with Roosevelt's support, and the Court's absurd statutory interpretation to the contrary absolved Congress and the President of responsibility for violating the constitutional rights of Japanese-Americans by shifting blame to a lowly

---

> authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas.

Id. at 100.

143 *Korematsu*, 323 U.S. at 242–48 (Jackson, J., dissenting). Particularly astute is his observation that the "chief restraint" on the President and his military commanders is "their responsibility to the political judgments of their contemporaries and to the moral judgments of history." *Id.* at 248.

144 *Id.* at 246–48. He made the crucial point that the Court's validation of the government's discrimination, by establishing a constitutional principle that could be invoked to justify similar repression in the future, was far worse than the military order itself, which was temporary. *Id.* at 245–46. Two other Justices contended that the Court had abdicated its responsibility to enforce the Constitution by allowing such unjustified discrimination. *See id.* at 225–33 (Roberts, J., dissenting); *id.* at 233–42 (Murphy, J., dissenting). For an excellent analysis of the Japanese relocation policy and cases, see PETER IRONS, JUSTICE AT WAR (1983).

145 *Ex parte* Endo, 323 U.S. 283, 298–302 (1944).

146 *Id.* at 302; *see also id.* at 297, 300–04 (construing the statute). *See* Sunstein, *supra* note 22, at 83–85, 90–93 (arguing that the Court during World War II declined to decide the extent of the President's constitutional war powers, but rather upheld the President when he acted pursuant to congressional authorization (*Korematsu* and *Hirabayashi*) and rebuffed him when he did not (*Endo*)).

agency, the WRA.[147] Second, the Justices delayed deciding the case until the day after Roosevelt announced he would end the internment.[148]

Overall, the Court deferred to Roosevelt's Lincolnesque assertion of remarkably broad power to win a war that threatened the existence of the United States and all other democracies. The majority of Justices correctly realized that, in such dire circumstances, they could do little to thwart our longest-serving President, who enjoyed immense popular and congressional support and who had no compunction about challenging the Court.[149] Cases like *Quirin* and *Korematsu* are sobering reminders of the limits on judicial review in wartime.

It is worth noting, however, that the year after FDR died and World War II ended, the Court declined to extend *Quirin*. Rather, in

---

147 *See* Kang, *supra* note 9, at 260–61, 268–75. *Endo* vividly demonstrates the naiveté of assuming that the Court engages in an impartial effort to ascertain whether or not Congress authorized a particular wartime action. *See supra* notes 23–25, 28 and accompanying text.

148 *See* Sunstein, *supra* note 22, at 84 n.167 (making this point, but noting that some historians have debated the timing issue); *see also* ROSSITER, *supra* note 84, at 47 (emphasizing that the Court decided *Endo* only after the military area had been disestablished and the relocation camps were being broken up). In another example of convenient timing, Roosevelt successfully seized over sixty plants where labor disputes had impeded the war effort, but the Court waited until the end of the war to consider a legal challenge to these seizures. *See* Montgomery Ward & Co. v. United States, 326 U.S. 690 (1945) (directing the lower court to dismiss the case as moot because the government had returned the disputed property); *see also* ROSSITER, *supra* note 84, at 59–63 (describing the Court's response to FDR's seizures).

149 The lone President to serve more than two terms, Roosevelt was elected four times with resounding majorities. *See* David Leip's Atlas, *supra* note 115, at http://uselectionatlas.org/RESULTS/ (select "General by Year," then follow 1932, 1936, 1940, and 1944). In 1935, when the Justices considered his decision to take the United States off the gold standard, he was "in the event of an unfavorable ruling, prepared to defy the Court and precipitate a constitutional crisis." *See* William E. Leuchtenberg, *Charles Hughes: The Center Holds*, 83 N.C. L. REV. 1187, 1191 (2005). When the Court in 1935–1936 invalidated several critical New Deal statutes, Roosevelt famously proposed to appoint six new Justices to overrule such decisions. Moreover, FDR chose as his appointees not independent-minded jurists, but rather political professionals sympathetic to his policies. *See* William P. Marshall, *Constitutional Law as Political Spoils*, 26 CARDOZO L. REV. 525, 525 (2005). These Justices almost certainly understood that Roosevelt was unlikely to alter his war policies because of an adverse Court holding. As his Attorney General famously remarked, Roosevelt illustrated that "[t]he Constitution has not greatly bothered any wartime President." FRANCIS BIDDLE, IN BRIEF AUTHORITY 219 (1962); *see* Goldsmith & Sunstein, *supra* note 8, at 278 (describing the popularity of, and respect commanded by, Roosevelt and Biddle); *see also* CORWIN, *supra* note 53, at 287 (stressing that FDR, like Lincoln, asserted power to effectively suspend the Constitution if he determined that doing so was necessary to win a war).

Duncan v. Kahanamoku,[150] it held that a federal statute imposing martial law in Hawaii, which did not mention military commissions, should be read as prohibiting the executive from using such commissions where the civil courts remained open and loyal civilian citizens had been charged with garden-variety crimes that had no impact on national security.[151] Thus, as in *Milligan*, the Court attempted to salvage some restraints on the government's exercise of war powers after the immediate crisis had passed.[152]

D. The Cold War and the Modern Era

After World War II, the Court sent out mixed signals about its willingness to engage in serious judicial review of presidential actions in military and foreign affairs. On the one hand, it declared in 1948 that

> the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither the aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[153]

---

150 327 U.S. 304 (1946).

151 *Id.* at 315–23. The Court emphasized that this case involved loyal citizens, and thus it did not question military jurisdiction over enemy belligerents in cases like *Quirin*. *Id.* at 313, 319. The Court also conceded that the federal organic act governing Hawaii did not clearly address military commissions, but declared that it would resolve this ambiguity in favor of preserving judicial procedures. *Id.* at 319–23. Once again, the Justices did not interpret a statute to glean Congress's intent (which was indeterminate), but rather simply implemented extra-statutory principles.

152 *See* Scheindlin & Schwartz, *supra* note 84, at 839–40 (pointing out that, as the exigencies of World War II decreased, the Court reasserted its role in cases like *Endo* and *Kahanamoku*); *see also* Cole, *Judging*, *supra* note 8, at 2572, 2576 (contending that such decisions serve a valuable function by creating some legal constraints on the government in responding to future emergencies). Whether such limits have teeth is debatable; *Milligan* had little effect on Presidents' conduct of later wars, especially World War II. *See* ROSSITER, *supra* note 84, at 52–59, 127–29 (concluding that the Court imposes restrictions after the emergency has passed, thereby making them more theoretical than practical in the context of fighting an actual war).

153 Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); *see also* Dennis v. United States, 341 U.S. 494, 495 (1951) (upholding the Smith Act, which effectively made it a crime to be a member of (or support) the Communist Party).

Two key cases involving military tribunals illustrated this deferential approach.

First, in *Johnson v. Eisentrager*,[154] the Court held that nonresident enemy aliens who had been captured in China, convicted there of war crimes by a United States military commission, and transferred to an American military prison in Germany had no right to federal judicial access:[155] "Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security."[156] Allowing federal courts to extend the writ of habeas corpus beyond their territorial jurisdiction would hinder the war effort and aid our enemies by imposing large risks and costs (especially in transporting and caring for prisoners and their witnesses), undermining the authority of commanding officers and diverting their attention, and generating friction between federal judges and the military.[157] Accordingly, the Court refused to reexamine the proceedings of the military commission—an institution with well-established authority to punish offenses against the law of war.[158]

Second, *Madsen v. Kinsella*[159] affirmed a military tribunal's jurisdiction to try a civilian United States citizen for murdering her husband, a lieutenant serving in the American-occupied area of Germany.[160] The Court emphasized that Congress had long acknowledged the President's power as Commander in Chief to establish military commissions as part of his "urgent and infinite responsibility . . . of combating the enemy"[161]:

> Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent government responsibilities related to war. . . . Neither their procedure

---

154 339 U.S. 763 (1950).

155 *Id.* at 767–77.

156 *Id.* at 774; *see also id.* at 776–77 (citing the Court's adherence to this rule from the early days of the Republic). By contrast, a resident alien could obtain limited judicial review to determine whether a state of war existed and whether he was, in fact, an enemy alien. *Id.* at 775–76, 784.

157 *Id.* at 777–79. The Court distinguished *Quirin* as involving saboteurs who had been captured and tried within the United States for actions occurring there. *Id.* at 779–80. Similarly, the prisoners in *Yamashita* had committed offenses and been jailed and tried within American-controlled territory. *Id.* at 780–81.

158 *Id.* at 786–87.

159 343 U.S. 341 (1952).

160 *Id.* at 342–62.

161 *Id.* at 348.

> nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth.[162]

On the other hand, in *Youngstown Sheet & Tube Co. v. Sawyer*,[163] the Court rejected President Truman's claim that Article II implicitly authorized him to order the seizure and operation of American steel mills to avert a nationwide strike that threatened steel production vital to the Korean War effort.[164] The majority held that Truman had usurped Congress's power to make laws in the domestic policy arena because the Labor Management Relations Act did not authorize the executive to seize property to settle labor disputes.[165] Nor did the President have power to take this action as Commander in Chief, as would have been true if he had been directing the armed forces in the foreign theater of war.[166]

In a concurring opinion, Justice Jackson argued that the Constitution's text, history, and precedent did not reveal any "useful and unambiguous authority applicable to concrete problems of executive power," but rather provided "quotations from respected sources on each side of any question . . . [that] largely cancel each other."[167] Accordingly, he urged a flexible, pragmatic approach recognizing that "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[168] Jackson identified three main categories. First, where Congress authorizes the President's action, a very strong presumption of constitutionality arises, rebuttable only on a showing that the federal government as a

---

162 *Id.* at 346–48. The Court concluded that Congress, in Article of War 15, had extensively regulated courts-martial but had preserved the existing jurisdiction of executive branch military commissions over common-law war crimes, consistent with historical practice and with precedent like *Quirin* and *Yamashita*. *Id.* at 347–55; *cf.* Toth v. Quarles, 350 U.S. 11 (1955) (ruling that a civilian living in America could not constitutionally be tried by court martial for murder allegedly committed when he was in the Air Force); Reid v. Covert, 354 U.S. 1, 5–15 (1957) (holding that an American citizen who had been convicted of murdering her husband, a U.S. military officer stationed outside of an occupied war zone (England), had been denied her constitutional right to a jury trial); United States v. Verdugo, 494 U.S. 259, 264 (1990) (limiting *Reid*'s application to American citizens, not aliens).

163 343 U.S. 579 (1952).

164 *See id.* at 582–89.

165 *See id.* at 585–86 (supporting this conclusion by pointing out that Congress had rejected an amendment that would have empowered governmental seizures of property in cases of emergency). Because Congress had not authorized the President's actions, he could not claim to be merely exercising his Article II power to execute the law. *Id.* at 587–88.

166 *See id.* at 587.

167 *See id.* at 634–35 (Jackson, J., concurring).

168 *Id.* at 635.

whole lacks power.[169] Second, where statutes are silent, "a zone of twilight [exists] in which [the President] and Congress may have concurrent authority, or in which distribution is uncertain," and in such cases "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[170] Third,

> [w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[171]

Justice Jackson concluded that the seizure of the steel mills fell into this third category.[172] He rejected Truman's argument that the executive had virtually unlimited inherent authority as Commander in Chief to meet emergencies such as war, but rather interpreted the Constitution as enabling Congress to expand the President's powers as it deems necessary to deal with such threats.[173] Yet Jackson acknowledged that Congress had to exercise such power or would lose it.[174]

Chief Justice Vinson and two colleagues dissented on the ground that various statutes *did* authorize the President's action[175] and that, in any event, Truman had independent Article II power to take steps he thought necessary to win the Korean War.[176] This dissent again demonstrates that the question of legal authorization for the exercise of war powers is often contestable.

In brief, the majority apparently felt that the Korean War posed a far less critical threat than World War II, that Truman had proceeded

---

169 *Id.* at 635–37.

170 *Id.* at 637.

171 *Id.* at 637–38.

172 *Id.* at 640.

173 *Id.* at 640–55.

174 *Id.* at 654.

175 Congress had given the President vast power to prosecute the war in Korea and had instituted wage and price controls to ensure production of key commodities like steel. *Id.* at 668–72 (Vinson, C.J., dissenting). The Chief Justice contended that (1) Truman had a duty to execute these laws and to determine how they could best be harmonized with the Labor Management Relations Act, and (2) no federal statutory provision prohibited taking property as necessary to vindicate Congress's wartime policies. *Id.* at 672–79, 701–10.

176 *Id.* at 680–700 (setting forth a detailed history of presidential actions during wartime, including seizures of property).

without any clear congressional approval, that he had overstepped his constitutional bounds, and that fundamental Fifth Amendment rights were at stake. None of the Justices mentioned that in 1952 Truman lacked the popularity and political capital to resist the Court's judgment.[177]

The Court eventually adopted Justice Jackson's analytical model.[178] Nonetheless, it has applied this framework with varying degrees of rigor, often to reach results that are at odds with Jackson's views. For example, in *Dames & Moore v. Regan*,[179] the Court sustained President Carter's order suspending private claims in American courts against Iran, even though no statute had expressly authorized this suspension, on the ground that Congress had done so implicitly by acquiescing to similar executive acts in the past.[180] Indeed, in almost

177 *See* Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT. 63, 64–75 (2002) (concluding that the Court reflected the tide of public opinion, which had turned decisively against Truman because he had asserted unlimited executive power to fight a war that most Americans no longer supported). *Youngstown* was "the backlash to the legally clumsy attempt, by a famously unpopular President, to invoke national security as the justification for seizing steel mills during a labor dispute in 1952, an election year in which control of the White House subsequently shifted from one party to the other." J. Gregory Sidak, *The Price of Experience: The Constitution After September 11, 2001*, 19 CONST. COMMENT. 37, 42 (2002). Sidak argues that Justice Jackson's eloquent statement of liberty-based limits on presidential prerogatives has been supplanted by the experience of 9/11, which demonstrated the truly compelling nature of the government's interest in defending its citizens. *Id.* at 37–42, 53–61.

178 *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 668–69 (1981). The Court has struck down a few measures justified as exercises of war powers, albeit not involving presidential military decisions. *See, e.g.*, United States v. Robel, 389 U.S. 258, 262 (1967) (declaring unconstitutional a federal law prohibiting Communists from working in defense plants); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165–67 (1963) (invalidating a statute taking away the citizenship of anyone who had evaded service in World War II or the Korean War).

179 453 U.S. 654.

180 *Id.* at 656, 669–88; *see* KOH, *supra* note 11, at 139–40 (maintaining that the Court "inverted the *Steel Seizure* holding" by suggesting that "[i]n responding to perceived national crises, the president should act first, then search for preexisting congressional blank checks, rather than seek specific prior approval of controversial decisions"). *But see* Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMMENT. 87, 91–93 (2002) (claiming that *Youngstown*'s significance is more symbolic than doctrinal, as it provides few concrete legal guidelines to resolve disputes, particularly concerning whether the President has acted in accordance with Congress's implied will); *id.* at 93–95, 125–54 (criticizing the Court's tendency to avoid constitutional questions through dubious statutory interpretations and recommending that it assess Congress's authorization of executive conduct by applying ordinary delegation principles and, if it finds authorization lacking, resolving issues about the scope of the President's constitutional powers).

every major case after *Youngstown*, the judiciary has deferred to the executive in military and foreign affairs.[181] For instance, federal courts consistently rejected constitutional challenges to the undeclared wars in Vietnam,[182] Nicaragua,[183] and the Persian Gulf.[184] Thus, there is little support for the notion that the judiciary has gradually become more vigorous in exercising judicial review over military decisions.[185]

---

181 *See, e.g.*, Regan v. Wald, 468 U.S. 222, 243 (1984) (accepting the President's decision continuing the embargo against Cuba); Haig v. Agee, 453 U.S. 280, 304–07 (1981) (sustaining the Secretary of State's revocation of the passport of a dangerous former CIA agent and remarking that "it is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation" (quoting Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964))). *See generally* Mark E. Brandon, *War and the American Constitutional Order*, 56 VAND. L. REV. 1815, 1856 (2003) (expressing skepticism about scholars' pronouncements that cases like *Youngstown* have led to the demise of the line of precedent epitomized by the *Prize Cases* and *Korematsu*).

182 *See, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307, 1310–11 (2d Cir. 1973); Sarnoff v. Connally, 457 F.2d 809, 809–10 (9th Cir. 1972); Simmons v. United States, 406 F.2d 456, 460 (5th Cir. 1969). Although most courts denied such claims on political question grounds, some asserted limited power to determine whether Congress had participated in the decision to wage war—for example, by passing resolutions and making necessary appropriations. *See, e.g.*, Orlando v. Laird, 443 F.2d 1039, 1042–43 (2d Cir. 1971); *see also* Corn, *supra* note 26, at 218–31 (summarizing Vietnam War cases). In *Gilligan v. Morgan*, 413 U.S. 1 (1973), the Court held that military training and procedures raised political questions, and hence dismissed a complaint alleging that negligent training of the National Guard had led to the shooting of antiwar protestors at Kent State. *Id.* at 6–9; *see* Michael E. Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135, 1167–78 (1970) (criticizing the judiciary's refusal to review constitutional challenges to the Vietnam War).

The leading counterexample is *New York Times v. United States*, 403 U.S. 713 (1971) (rejecting the Nixon Administration's claim that national security overrode a newspaper's First Amendment right to publish the "Pentagon Papers," which contained confidential and embarrassing information about America's involvement in Vietnam).

183 *See, e.g.*, Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985); Ramirez v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984), *vacated and remanded*, 471 U.S. 1113 (1985); Crockett v. Reagan, 720 F.2d 1355, 1357 (D.C. Cir. 1983).

184 *See, e.g.*, Dellums v. Bush, 752 F. Supp. 1141, 1152 (D.D.C. 1990); Ange v. Bush, 752 F. Supp. 509, 518 (D.D.C. 1990). This tradition continued when courts declined to entertain challenges to President Clinton's military intervention in the former Yugoslavia. *See* Campbell v. Clinton, 203 F.3d 19, 24 (D.C. Cir. 2000).

185 *See* Devins & Fisher, *supra* note 177, at 75–84 (accusing the modern Court of abdicating its duty to enforce the Constitution's written limits on the government, reflecting the public's view that the President is the source of military power and the failure of Congress, for political reasons, to assert its constitutional prerogatives). Professor Cole has acknowledged that judges, in the midst of national security crises, have been overly deferential and have rarely provided relief to victims of unconstitutional conduct. *See* Cole, *Judging*, *supra* note 8, at 2565–66, 2568–71; Cole, *Morality*,

E. Summary

The Court's precedent concerning presidential power during wartime does not follow a linear progression yielding clear-cut rules. Rather, the cases vary and are heavily fact-dependent. Generally, the Court has deferred to the President, either treating his assertion of authority as raising political questions (e.g., *Mott*, *The Prize Cases*, *Vallandigham*, and *Eisentrager*) or upholding his actions after a lenient review on the merits (e.g., *Quirin* and *Korematsu*).[186] However, in decisions like *Milligan*, *Kahanamoku*, and *Youngstown*, the Court has checked the President and championed individual rights. The degree of deference to the executive ebbs and flows based upon myriad (and often highly subjective) factors, including (1) the seriousness and urgency of the military crisis, and the importance of the specific presidential measure in resolving it; (2) the presence or absence of congressional endorsement for the executive's action; (3) the significance of the individual legal rights at stake; and (4) the political strength of the President and the likelihood he will obey the Court's judgment

---

supra note 8, at 1761–62. Nonetheless, he maintains that the eventual condemnation of such bad decisions, and the Court's announcement of legal standards in wartime cases (particularly those decided after the immediate crisis has passed), gradually have limited the options the political branches can exercise in future emergencies (e.g., today detention based solely on race would not be tolerated). *See* Cole, *Judging*, *supra* note 8, at 2566, 2571–77; Cole, *Morality*, *supra* note 8, at 1762–63; *cf.* Mark Tushnet, *Defending* Korematsu*? Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 283–307 (arguing that past instances of what society comes to see as unjustifiable incursions on civil liberties progressively reduce the scope of such violations, but that new threats generate novel policy responses that endanger constitutional rights in different ways).

However, I share the skepticism of other scholars who do not view modern judges as more willing than their predecessors to check the political branches' constitutional excesses during wartime. *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1041–44 (2004); Tushnet, *supra*, at 305; *see also* Posner & Vermeule, *supra* note 12, at 623–25 (dismissing as speculative the notion that government officials, including courts, will show greater restraint than in the past if grave circumstances akin to the Civil War and World War II were to arise); *cf.* Ackerman, *supra*, at 1029–91 (rejecting the absolutist civil libertarian position as unrealistic after 9/11, and instead proposing a legal regime in which we permit emergency presidential actions that restrict liberty but only temporarily, through a requirement that Congress reapprove such measures by ever-increasing majorities at stated intervals).

186 *See* ROSSITER, *supra* note 84, at 5–10, 90–92, 126–42 (contending that the Court typically has adopted a realistic attitude during wartime by dismissing cases on jurisdictional grounds or stretching the Constitution to validate government actions and by trusting the people and Congress to check any abuses by the President).

(considerations that are never articulated but that often seem crucial).[187]

In short, the results are unpredictable and appear to rest on an ad hoc balancing of various legal and pragmatic elements. Thus, one must be cautious in reading any single case (or group of cases decided within a short period) as portending a major shift in doctrine. It is against this background that the recent decisions involving the War on Terrorism should be evaluated.

III. THE "ENEMY COMBATANT" CASES

Congress's Authorization for Use of Military Force (AUMF) empowered the President to employ "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the [9/11] terrorist attacks [and] to prevent any future acts of international terrorism against the United States."[188] President Bush quickly dispatched armed forces to Afghanistan and intensified efforts to combat domestic terrorism.

Most importantly, Bush asserted authority to indefinitely incarcerate anyone he alone identified as an "enemy combatant" and, if he chose, to try such prisoners by a military commission of his own creation. The Court has rebuffed both of these claims. A careful examination of these decisions, however, reveals that some commentators

187 *See* Brandon, *supra* note 181, at 1833 (maintaining that the Court's flexible balancing approach permits "fine judgments about the nature of the military conflict, the severity of the danger to the interests of state, and the character of the claimed right"); *see also* Bradley & Goldsmith, *supra* note 23, at 2056 (recognizing that legal doctrine relevant to interpreting congressional authorizations of force does not always yield "determinate answers" because judicial decisions are influenced by considerations such as perceptions of threat levels and risks to civil liberties); Powell, *supra* note 12, at 528–29 (citing with approval Louis Henkin's observation that the Court has developed few legal principles concerning presidential authority in foreign affairs and instead resolves cases on an ad hoc basis); *cf.* Raquel Aldana-Pindell, *The 9/11 "National Security" Cases: Three Principles Guiding Judges' Decision-Making*, 81 OR. L. REV. 985, 996–98 (2002) (arguing that judicial deference should be relaxed when the President addresses domestic affairs rather than true war powers, exercises power that the Constitution reserves to Congress, or allegedly violates the Bill of Rights); Margulies, *supra* note 23, at 385–443 (contending that courts should adopt an "institutional equity" approach by examining whether the government has shown that (1) its exigent measures are justified because existing legal remedies are inadequate, and (2) its need for flexibility in addressing a military threat outweighs the damage to the integrity of legal institutions and the hardships imposed on members of disfavored minority groups).

188 Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. III 2003)).

have exaggerated the negative impact of these cases on President Bush's policies and on executive power generally.

A. Cases Involving the Detention of Enemy Combatants

Enemy combatants have included a few American citizens, who are protected by a 1971 statute providing that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[189] Two citizens and one alien who had been labeled "enemy combatants" by the Bush Administration brought constitutional challenges. These three cases will be analyzed in turn.

1. *Hamdi v. Rumsfeld*

Hamdi, an American citizen by birth who moved to Saudi Arabia as a child, was captured in Afghanistan.[190] The United States asserted that Hamdi had fought with the Taliban and detained him indefinitely—without formal charges—at several military prisons (most recently, one in South Carolina).[191] Hamdi's father filed a habeas petition alleging that his son had gone to Afghanistan to do relief work.[192] All of the Justices except Thomas voted to strike down the government's actions, albeit for different reasons.

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, reached two major conclusions. First, Congress's authorization to the President to use "all necessary and appropriate force" implicitly included the long-recognized war power of imprisoning "enemy combatants" for the duration of the armed conflict, and under *Quirin* it did not matter that Hamdi was an American citizen.[193] Second, the Due Process Clause required balancing two crucial interests.[194] On the one hand, Hamdi had a fundamental right to be free from incarceration without due process[195]:

189 18 U.S.C. § 4001(a) (2000).

190 Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (plurality opinion).

191 *Id.* at 511–12 (noting that this detention had been based solely upon an affidavit from a Defense Department official that Hamdi had been a Taliban fighter).

192 *Id.* at 511.

193 *Id.* at 516–23; *see also id.* at 519–21 (rejecting the administration's broader claim that Hamdi could be detained indefinitely, not merely until the end of the war in Afghanistan). Justice Thomas agreed with the plurality that the AUMF authorized the imprisonment of enemy combatants. *See id.* at 587–98 (Thomas, J., dissenting).

194 *Id.* at 529–32 (plurality opinion).

195 *Id.* at 530–31 (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 125 (1866)).

> [It] is . . . vital that . . . [we] not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.[196]

On the other hand, the government had critical interests in (1) ensuring that those who had actually fought for the enemy not return to battle, and (2) avoiding a trial-like process, which would distract military officers and lead to disclosure of military secrets.[197] Accommodating these competing concerns, the Court "[held] that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[198]

Justice O'Connor conceded that "the exigencies of the circumstances may demand that . . . enemy combatant proceedings be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[199] For instance, ordinary rules of evidence (e.g., the rule against hearsay) need not be observed.[200] Indeed, even an impartial, "appropriately authorized" military tribunal might meet the announced standards.[201] The plurality asserted that such limited procedures would have little or no impact on the actual conduct of the war.[202]

In short, the Court acknowledged the superior institutional competence of politically accountable officials over military strategy and operations[203] and its special sensitivity to executive decisions in this context.[204] Nonetheless, Justice O'Connor declared that separation of powers required the involvement of all three branches when military actions invaded individual liberties:

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prose-

196 *See id.* at 532; *see also id.* at 539 (declaring that the Court must be sensitive both to national security issues and to "the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns").

197 *Id.* at 531–32.

198 *Id.* at 533.

199 *Id.*

200 *Id.* at 533–34.

201 *Id.* at 538.

202 *Id.* at 534.

203 *Id.* at 531 (citing Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)).

204 *Id.* at 536.

> cution of a war, and recognize that the scope of discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.[205]

Justice Souter, joined by Justice Ginsburg, agreed that federal courts had jurisdiction to examine Hamdi's due process claim, but concluded that the AUMF did not provide the express, specific congressional authorization for executive imprisonment of citizens required by the 1971 federal statute.[206] Although Souter did not reach the issue of what processes should be used, he disavowed the plurality's suggestion that a military commission might suffice.[207]

Justice Scalia, along with Justice Stevens, went much further.[208] In their opinion, the Constitution allows the detention of an American citizen only pursuant to a criminal prosecution in federal court with all attendant procedural rights, except in the rare instance when Congress has suspended habeas corpus.[209] Accordingly, the President could not circumvent this clear constitutional design by asserting that a military emergency required different procedures against citizens accused of aiding the enemy.[210] Justice Scalia characterized this ban on indefinite wartime detention of citizens as part of the Framers' more "general distrust of military power permanently at the Execu-

---

205 *Id.* at 535. Therefore, the Court declined to accept the government's argument that judicial review should be limited to determining either that (1) the President had legal authority for the detention scheme, or (2) there was "some evidence" for the individual imprisonment—a standard that could be satisfied by the executive alone providing supporting facts. *Id.* at 526–27, 535–36.

206 *Id.* at 540–50 (Souter, J., concurring). They conceded, however, that the President might have power in "a moment of genuine emergency" to detain citizens if he reasonably feared they might be an imminent threat to the nation. *Id.* at 552. *See* Bradley & Goldsmith, *supra* note 23, at 2103–06 (maintaining that Justice Souter erred in insisting on a "clear statement" in the AUMF that citizens who were enemy combatants could be detained, because this interpretive canon properly applied only to protect the liberty of citizens who were noncombatants).

207 *Hamdi*, 542 U.S. at 553.

208 *Id.* at 554–79 (Scalia, J., dissenting).

209 *Id.*

210 *Id.* at 554–57, 564–79. Justice Scalia invoked *Milligan* as properly rejecting the government's attempt to hold and convict a citizen through military processes rather than a criminal trial in a civil court. *Id.* at 566–69 (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121–22 (1866)). He then argued that *Quirin* had misinterpreted *Milligan*. *Id.* at 569–73 (citing *Ex parte* Quirin, 317 U.S. 1, 45 (1942)); *see also id.* at 573 (distinguishing *Quirin* on the ground that the petitioners there—including an American citizen—had conceded they were members of enemy armed forces).

tive's disposal."[211] He observed that, because the Constitution mandated ordinary criminal procedures for citizens, the plurality had no authority to suggest new processes such as dispensing with the rules of evidence or allowing decision by a neutral military tribunal.[212]

Finally, Justice Thomas dissented on the ground that judicial review should be narrowly confined to ascertaining whether the law authorized the President to hold enemy combatants, and he found that both Article II and the AUMF conferred such power.[213] He contended that the plurality had erred in asking the further question of whether Hamdi actually was an enemy combatant—a factual judgment entrusted solely to the President.[214] In Justice Thomas's view, courts lacked the expertise and relevant information to second-guess the President's decision, which involved delicate and complex policy calibrations.[215] Moreover, he concluded that due process required only that the President determine in good faith that detention was

---

211 *Id.* at 568.

212 *Id.* at 575–77. Justice Scalia closed by denying the applicability of the maxim *inter arma silent leges* to a Constitution designed to confront and accommodate war. *Id.* at 579.

Scalia's argument has received detailed support from Carlton Larson, who makes four major points. First, Article III's Treason Clause incorporated the centuries-old English understanding that anyone who owed allegiance to a nation (either citizens or those living temporarily and openly in the country) and breached that allegiance would be subject to trial in an ordinary court. *See* Larson, *supra* note 63, at 867–83. Second, American courts faithfully adhered to this understanding for a century and a half. *Id.* at 867–68, 884–94. Third, the Court dramatically deviated from this tradition in *Quirin* by allowing military jurisdiction over alleged traitors, and repeated this mistake in *Hamdi*. *Id.* at 868, 894–99. Fourth, most terrorists who enter the United States are engaged in treason because they are either "levying war" against it (i.e., using group force to usurp the federal government's functions or alter its policies) or aiding their "enemies" (i.e., foreigners with no allegiance to America engaged in hostilities against it). *Id.* at 899–914; *see also id.* at 920–23 (contending that courts can review the political branches' designation of someone as an "enemy," but must show substantial deference). Ultimately, Professor Larson concludes that terrorists are not engaged in activities so militaristic and horrific as to justify an exception that would commit them to military jurisdiction. *Id.* at 900, 923–26.

Although Larson's historical research is impressive, courts cannot ignore technological changes—such as the development of chemical, biological, and nuclear weapons as well as computerized communications—that make individual or small groups of terrorists able to inflict infinitely more destruction than the Founders could have imagined. Likewise, the September 11 attacks revealed the shortcomings of the previous executive approach of treating terrorists like ordinary criminals and giving them trials in federal courts.

213 *See Hamdi*, 542 U.S. at 579–98 (Thomas, J., dissenting).

214 *See id.* at 584–86.

215 *See id.* at 579–86.

necessary to protect the public,[216] and hence rejected the plurality's crafting of a balancing test.[217]

2. *Rasul v. Bush*

The federal habeas corpus statute authorizes district courts, "within their respective jurisdictions," to hear petitions by anyone claiming to be imprisoned in violation of the federal Constitution, laws, or treaties.[218] In *Rasul v. Bush*,[219] the Court interpreted this provision to include challenges by aliens captured abroad and detained at the U.S. Naval Base in Guantanamo Bay, which by treaty is under America's exclusive jurisdiction and control, but subject to Cuba's "ultimate sovereignty."[220]

In his majority opinion, Justice Stevens recognized that *Johnson v. Eisentrager*[221] had held that federal courts lacked constitutional habeas corpus jurisdiction over aliens who had been convicted of war crimes by a military commission overseas and incarcerated in Germany.[222] The Court distinguished *Eisentrager* on the grounds that the petitioners in *Rasul* were not nationals of countries at war with the United States, had denied committing acts of aggression against America, had never been given access to any tribunal, and had been imprisoned in a territory over which the U.S. had complete jurisdiction.[223] Justice Stevens further noted that the opinion in *Eisentrager* had focused on the constitutional (not statutory) right to habeas, except for "a passing reference to the absence of statutory authorization."[224] The Court

216 *See id.* at 589–91 (citing Luther v. Borden, 48 U.S. (7 How.) 1, 43–45 (1849), and other cases). Justice Thomas distinguished *Milligan* and similar decisions on the ground that they involved criminal proceedings, whereas Hamdi had been detained not as a punishment but rather as a safety precaution. *See id.* at 592–93.

217 *See id.* at 594–98 (arguing that the plurality failed to account for the government's interests in holding enemy combatants as a crucial part of conducting war, using detention to gather critical intelligence, avoiding the involvement of military officials in litigation, and preventing the disclosure of confidential information).

218 28 U.S.C. § 2241(a), (c)(3) (2000).

219 542 U.S. 466 (2004).

220 *See id.* at 470–85 (quoting Lease of Land for Coaling and Naval Stations, art. III., U.S.-Cuba, Feb. 23, 1903, T.S. no. 418).

221 339 U.S. 763 (1950).

222 *Rasul*, 542 U.S. at 475.

223 *Id.*; *see also id.* at 486–88 (Kennedy, J., concurring) (agreeing with these distinctions, and stressing that in *Eisentrager* federal judicial interference would have had a harmful effect on the political branches' conduct of military affairs by reopening the case of enemy prisoners who had been duly tried, convicted, and sentenced by military commissions in a war zone far outside the United States' territorial jurisdiction).

224 *Id.* at 476 (majority opinion). The Court also concluded that *Eisentrager*'s terse rejection of jurisdiction under the habeas statute had been implicitly overruled in

limited its ruling as follows: "[F]ederal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."[225]

In dissent, Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) argued that *Eisentrager* had correctly interpreted the habeas statute as not extending to aliens kept in military prisons outside the United States' borders and beyond the territorial jurisdiction of all federal courts.[226] Justice Scalia reiterated the *Eisentrager* Court's warning that judicial interference might produce dire consequences for the military in terms of risk, cost, hampering the war effort, aiding our enemies, diverting commanders' attention, and sparking disputes between judges and the military.[227] Justice Scalia decried the majority's holding that federal courts have habeas jurisdiction whenever they can reach a "custodian" (as contrasted with the prisoner himself) as a "breathtaking" assertion of jurisdiction throughout the world.[228]

3. *Rumsfeld v. Padilla*

Padilla, an American citizen, was apprehended pursuant to a warrant issued by a U.S. District Court in New York in connection with a grand jury investigation into September 11.[229] While Padilla's motion to vacate this warrant was pending, President Bush designated him an "enemy combatant" and ordered Secretary of Defense Donald

---

Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), which permitted a federal district court to review a petition filed by a prisoner outside its territorial jurisdiction (he was being held by another district court) so long as its process could reach his *custodian*. *Rasul*, 542 U.S. at 478–79 (citing *Braden*, 410 U.S. at 494–95). Justice Kennedy disputed the idea that *Braden* had overturned *Eisentrager*, and instead found that the district court had jurisdiction under the *Eisentrager* framework. *See id.* at 485–88 (Kennedy, J., concurring).

225 *Rasul*, 542 U.S. at 485 (majority opinion). Justice Stevens expressed no opinion about what proceedings would be necessary. *Id.*

226 *See id.* at 488–506 (Scalia, J., dissenting).

227 *Id.* at 499 (quoting Johnson v. Eisentrager, 339 U.S. 763, 778–79 (1950)). He pointed out that *Braden* applied not to foreigners outside of America, but rather to citizens in custody in multiple jurisdictions within the United States who wished to challenge the legality of their confinement. *See id.* at 493–97.

228 *Id.* at 498. "For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort." *Id.* at 506. Justice Scalia also emphasized that the Court's focus on the location of the custodians (not the prisoners) made irrelevant its elaborate treatment of the status of Guantanamo Bay, where the prisoners had been detained. *Id.* at 500.

229 Rumsfeld v. Padilla, 542 U.S. 426, 430–31 (2004).

Rumsfeld to detain him.[230] Rumsfeld moved Padilla to a Navy brig in South Carolina commanded by Melanie Marr.[231] Padilla then filed a habeas petition in the New York federal court and named Rumsfeld and Marr as respondents.[232]

On appeal, the Supreme Court held that the New York district court lacked jurisdiction.[233] The Court concluded that Marr was the only proper respondent because she, unlike Rumsfeld, was Padilla's immediate custodian in his core habeas challenge to his present physical confinement.[234] Accordingly, only the federal district court in South Carolina, where Marr lived, would have jurisdiction.[235] In dissent, Justices Stevens, Souter, Ginsburg, and Breyer reasoned that, to protect the purpose of the habeas writ, the Court should have recognized Rumsfeld as a proper respondent because he had been personally involved in the decision to transfer Padilla to South Carolina.[236]

4. A Critical Analysis of the "Enemy Combatant" Detention Cases

Most commentators hailed the Supreme Court for upholding fundamental constitutional liberties and reining in the excesses of the Bush Administration.[237] They are certainly correct that the majority of Justices, seeking to preserve basic due process values, interpreted the habeas corpus statute generously—as applying to virtually anyone

---

230 *Id.*

231 *Id.* at 432.

232 *Id.*

233 *See id.* at 434–51.

234 *See id.* at 434–42. The Court limited *Ex parte Endo*, 323 U.S. 283 (1944), to situations where the government moved the petitioner *after* he or she had properly named the immediate custodian as the respondent and the district court had taken jurisdiction, in which case the court could direct the writ to anyone within its jurisdiction who has authority to effectuate the petitioner's release. *Padilla*, 542 U.S. at 440–41. By contrast, here Padilla had been moved to South Carolina *before* he filed his habeas petition in the New York district court, which therefore never acquired jurisdiction. *Id.* at 441.

235 *See id.* at 442–51.

236 *Id.* at 460–62 (Stevens, J., dissenting) (stressing that such personal involvement distinguished this case from the run of the mill habeas petition). Moreover, as the government itself had initiated grand jury proceedings in the New York federal district court, and as that court could serve process on Rumsfeld, it was the most appropriate venue. *See id.* at 463–64. On the merits, the dissenters opined that neither Congress nor the Constitution authorized the executive branch to subject American citizens like Padilla to lengthy, incommunicado detention solely for the purpose of extracting information. *See id.* at 464 n.8, 465.

237 *See supra* note 9 and accompanying text.

detained indefinitely as an "enemy combatant."[238] Indeed, *Rasul* shows how far the Court was willing to distort the statute to ensure that even noncitizens outside of the United States could file habeas petitions—a conclusion that contradicted *Eisentrager*, as even Bush's most vocal opponents concede.[239] Furthermore, *Hamdi* is a very rare case in which the Court struck down a war policy that enjoyed the support of both political branches.[240]

Nonetheless, the Court hardly handed the President a total defeat, as many scholars claimed.[241] On the contrary, it repeatedly acknowledged the government's vital interest in conducting war effec-

---

238 *Padilla* is not to the contrary because the prisoner could still obtain habeas relief in another federal district court. *See* Steven R. Swanson, *Enemy Combatants and the Writ of Habeas Corpus*, 35 ARIZ. ST. L.J. 939, 971–81, 1000–06 (2003) (arguing that meaningful habeas review should be available to American citizens—especially those like Padilla who have been captured and are being detained in America during a time when the nation has not mobilized totally for war—but not to aliens, particularly those apprehended and imprisoned outside the United States like Rasul).

239 For example, Professor Katyal, who has taken a leading role in both litigating and commenting upon the enemy combatant cases, admitted that *Eisentrager* was directly on point in precluding habeas relief for the alien detainees in *Rasul*. *See* Katyal, *supra* note 138, at 1254–55. Rather, he argued that *Eisentrager* should not be treated as binding precedent today because of the intervening transformation of both the legal landscape (e.g., the enactment of the Uniform Code of Military Justice (UCMJ) in 1951, the United States' adoption of the Geneva Conventions in 1955, and the Warren Court's due process revolution) and the nature of war (especially the stateless and perhaps perpetual War on Terrorism). *See id.* at 1238–39, 1251–56. Similarly, Professor Cole declared that *Rasul* indicated the Court "may be ready to question some of its earlier precedents" and that "[t]he Guantanamo litigants prevailed not because of the strength of their legal arguments in court—the majority's statutory construction argument is more than a little strained, as Justice Scalia amply illustrates in his dissent—but because Guantanamo had become an international embarrassment to the United States." David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 651, 653 (2006). Congress swiftly overturned *Rasul*'s implausible statutory interpretation as to the Guantanamo detainees. *See infra* note 257 and accompanying text. *But see* James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497 (2006) (maintaining that the majority in *Rasul* correctly concluded that federal courts can review the legality of detention by the American military overseas, but that such jurisdiction rests not on the habeas statute but rather on the availability of declaratory and injunctive relief under the general federal question jurisdiction statute).

240 *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) (cautioning that congressional authorization of a President's action creates an extremely strong presumption of constitutionality).

241 *See supra* note 9 and accompanying text; *cf.* Sunstein, *supra* note 22, at 93–103 (contending that the Court properly issued narrow rulings that merely sustained federal court jurisdiction to require fair hearings for detainees, but left the details of such hearings to the political process).

tively and with minimal judicial disruption. Accordingly, the Court reaffirmed the political branches' superior expertise over national security matters, the general wisdom of deference to executive judgments, the government's need to protect military and foreign intelligence, the President's power to detain enemy combatants (even citizens) for the duration of a war, the minimal nature of due process requirements (e.g., allowing hearsay and trial by properly authorized military tribunals), and the rule against directing habeas writs to high-level federal officials. Moreover, the Court highlighted the tentative nature of its ruling by acknowledging that its "understanding may unravel" in the future if "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war."[242]

In short, these three cases did not necessarily signal a major shift in the Court's jurisprudence in which individual liberties will be upheld vigorously against executive claims of national security. Rather, they appear to reflect the established pattern of making complex, discretionary legal and political determinations based on several factors.

First, the emergency of September 2001 had dissipated, and the President's indefinite (perhaps permanent) detention of alleged enemy combatants without charges, access to counsel, or hearings struck most Justices as extreme measures in fighting the War on Terrorism.[243] Moreover, widespread condemnation of the United States' treatment of detainees at Guantanamo Bay and the abuse of prisoners at Abu Ghraib (shocking photos of which were published while the cases were pending) undoubtedly made the Court skeptical of the

242 Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion). *See generally* Nicholas G. Green, Note, *A "Blank Check": Judicial Review and the War Powers in* Hamdi v. Rumsfeld, 56 S.C. L. REV. 581 (2005) (positing that the Court's rhetorical assertion of broad review power contrasted with the practical effect of its decision, which was to show great deference to the political branches' exercise of war powers within certain outer limits); John Yoo, *Courts at War*, 91 CORNELL L. REV. 573 (2006) (concluding that the Court correctly acknowledged the government's wide discretion in fighting the War on Terrorism, but unwisely directed federal judges to assess the cases of detainees, which will require judges to make factual and legal judgments about national security that fall outside the scope of their individual and institutional competence).

243 *See* Bradley & Goldsmith, *supra* note 23, at 2123–24; *see also* Lobel, *supra* note 8, at 769–90 (suggesting that continued judicial deference to the President could lead to a dangerous governmental system in an era of perpetual warfare and permanent emergency, especially given that the War on Terrorism is of indefinite duration—unlike the nineteenth- and twentieth-century wars that bred the deferential approach).

administration's claim that it could be trusted to conduct the War on Terrorism free from judicial (and even congressional) oversight.[244]

Second, the legal rights at stake were hallowed. The government had attempted to deny the applicability of the ancient writ of habeas corpus to vindicate the most basic constitutional liberty—freedom from unlawful confinement.[245]

Third, President Bush, who squeaked into office in a bitterly contested election in 2000[246] and whose public approval ratings in 2004 hovered below fifty percent,[247] did not have the political strength or personal inclination to defy the Court's orders.

For the majority of Justices, all of the foregoing considerations apparently outweighed their countervailing judgment that Congress in the AUMF had authorized the President to detain enemy combatants, even though such legislative-executive agreement in the past has clinched the validity of the government's action.[248] The Court's statutory interpretation in *Hamdi* is sound, although the opposite conclusion is at least plausible. Indeed, Justice Souter's concurrence represents the more typical method of construing a general statute (the AUMF) as not authorizing a specific executive action (detention), thereby avoiding constitutional questions.[249] Under either the O'Connor or Souter approach, however, the upshot is that the President lost. Such result-oriented decisionmaking also characterizes

---

244 *See* Cole, *supra* note 239, at 653. Bush had argued that the President has independent Article II power to incarcerate enemy combatants, even without congressional authorization. *See, e.g., Hamdi*, 542 U.S. at 516–17. In Bush's defense, the President does have a special duty to protect American troops, and it is therefore troubling that "a number of detainees . . . have reappeared on the battlefield against the United States." *See* Bradley & Goldsmith, *supra* note 23, at 2125.

245 The Court accorded the Great Writ special treatment even during World War II, despite its overall tolerance of massive infringements of constitutional rights. Immediately after issuing its infamous *Korematsu* decision, the Court granted the habeas petition of a Japanese-American who had been imprisoned even though the government had not disputed her loyalty. *See Ex parte* Endo, 323 U.S. 283, 294, 305–07 (1944), discussed *supra* notes 145–49 and accompanying text.

246 *See* Robert J. Pushaw, Jr., Bush v. Gore: *Looking at* Baker v. Carr *in a Conservative Mirror*, 18 CONST. COMMENT. 359, 382–90 (2001) (describing the election dispute and the litigation it spawned).

247 *See* USA Today, Campaign 2004: USA Today/CNN/Gallup Poll Results, http://www.usatoday.com/news/politicselections/nation/polls/usatodaypolls.htm (last visited Jan. 20, 2007); *see also* Goldsmith & Sunstein, *supra* note 8, at 278 (contrasting Bush's narrow win and lack of broad-based support with FDR's landslide victories and widespread popularity).

248 *See, e.g., supra* notes 74, 105–06, 109, 128–29, 136, 141, 161, 168–69 and accompanying text.

249 *See* Sunstein, *supra* note 22, at 93–96.

Rasul, which rests on the dubious notion that Congress intended federal courts to entertain habeas actions instituted by foreign enemies captured and imprisoned outside the United States.

If the facts on the ground had been different, however, I suspect the results would have been different as well. For instance, if September 11 had been followed by more terrorist attacks, with attendant public pressure on the government to use all means necessary to protect Americans and with President Bush enjoying overwhelming popular support, I doubt the Court would have adopted such an expansive view of habeas corpus and due process. Of course, we can only hope (perhaps naively) that such a situation never comes to pass, and that therefore my hypothetical counterexample will never be tested.

B. The Legality of Military Commissions: Hamdan v. Rumsfeld

On November 13, 2001, George Bush invoked his authority under the AUMF and the Constitution to order that any noncitizen whom the President reasonably believed was an al Qaeda member or had participated in terrorist activities must be tried by a military commission appointed by the Secretary of Defense.[250] In July 2003, the Bush Administration designated for such a trial Salim Hamdan, a Yemeni national who had been captured in Afghanistan in November 2001 and transported to Guantanamo Bay in June 2002.[251] In July 2004, Hamdan was charged with conspiracy to commit acts of terrorism—specifically, serving as bin Laden's bodyguard and driver from 1996–2001, accompanying him as he encouraged terrorist attacks, transporting weapons used by al Qaeda, and receiving weapons training.[252] Thereafter, a Combat Status Review Tribunal found Hamdan's continued detention to be justified because he was an "enemy combatant."[253]

In November 2004, a federal district court granted Hamdan a writ of habeas corpus on the ground that the President's military commission had been established in violation of the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.[254] The U.S. Court of Appeals for the D.C. Circuit reversed, in an opinion joined by then-Judge Roberts holding that the Geneva Conventions were not judi-

250 *See* Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C. § 801 (Supp. IV 2004).

251 Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2759–60 (2006).

252 *Id.* at 2760–61.

253 *Id.* at 2761.

254 *Id.* at 2761–62 (citing district court opinion and provisions from the Geneva Conventions).

cially enforceable, that *Quirin* foreclosed constitutional objections to military tribunals, and that Hamdan's trial would not violate the UCMJ.[255]

After the Supreme Court accepted Hamdan's petition for review, Congress enacted the Detainee Treatment Act of 2005 (DTA).[256] Section 1005(e)(1) overturned *Rasul* by providing that "no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba."[257] Section 1005(h)(1) made this provision "effect[ive] on the date of the enactment of this Act [December 30, 2005]."[258] The government moved to dismiss on the ground that the DTA deprived the Supreme Court of jurisdiction.[259]

Justice Stevens, in an opinion joined in full by Justices Souter, Ginsburg, and Breyer and in part by Justice Kennedy, ruled that the Court had jurisdiction, that Congress had not authorized these military commissions, and that their structure and procedures violated the UCMJ and the Geneva Conventions.[260] Justices Scalia, Thomas, and Alito vigorously dissented.[261] For the sake of clarity, it is helpful to examine the jurisdictional and merits holdings (and corresponding dissents) separately.

1. Jurisdictional Issues

a. Statutory Repeal of Appellate Jurisdiction

The government contended that the DTA made plain that "no court" (including the Supreme Court) had jurisdiction to consider habeas petitions by Guantanamo Bay detainees, effective December

255 *Id.* at 2762 (citing Hamdan v. Rumsfeld, 415 F.3d 33, 38, 42–43 (2005)).

256 Pub. L. No. 109–148, §§ 1001–1006, 119 Stat. 2739, 2739–44 (2005) (codified in scattered sections of the U.S.C., including titles 10, 28, and 42).

257 *Id.* § 1005(e)(1), 119 Stat. at 2741–42 (codified at 28 U.S.C.A. § 2241 (West Supp. 2006)). The Court in *Rasul* had creatively construed the general habeas corpus statute as extending to aliens at Guantanamo. *See supra* Part III.A.2. As to such petitioners outside of Guantanamo, however, *Rasul* remained in force until the passage of the Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600, § 950j(b) (Oct. 17, 2006).

258 Detainee Treatment Act § 1005(h)(1), 119 Stat. at 2743 (codified at 10 U.S.C.A. § 801 note (West Supp. 2006)).

259 *Hamdan*, 126 S. Ct at 2762.

260 *See id.* at 2762–98.

261 *See id.* at 2810–23 (Scalia, J., dissenting); *id.* at 2823–49 (Thomas, J., dissenting); *id.* at 2849–55 (Alito, J., dissenting). Chief Justice Roberts did not participate because the D.C. Circuit decision he had joined was being reviewed.

30, 2005.[262] This argument, accepted by the dissenters, rested on long and unbroken precedent, which established two principles.[263] First, Article III grants Congress plenary power to make "exceptions" to the Supreme Court's appellate jurisdiction.[264] Second, a federal law ousting jurisdiction applies to pending cases, except when the statute explicitly reserves such jurisdiction.[265]

The majority characterized this precedent as setting forth not an ironclad rule, but merely a "presumption against jurisdiction."[266] This presumption could be rebutted by ordinary principles of statutory construction—here, that "a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."[267] Applying this interpretive canon to the DTA, Justice Stevens observed that section 1105(h)(2) expressly made sections 1005(e)(2) and (e)(3)—which grant the D.C. Circuit "exclusive jurisdiction" to review the "final decisions" of Combat Status Review Tribunals and military commissions—applicable to pending cases, whereas section 1005(h)(1) contained no such explicit termination of pending claims as to section 1005(e)(1).[268] Hence, the majority held that Congress had not

---

262 *Id.* at 2762–63 (majority opinion).

263 *See id.* at 2810–18 (Scalia, J., dissenting, joined by Thomas and Alito, JJ.).

264 *Id.* at 2819 (citing *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869)). In light of this long-recognized constitutional power, Justice Scalia rejected the majority's suggestion that its interpretation was preferable because it avoided "'grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases.'" *Id.* (citing majority opinion).

265 *Id.* at 2810–12 (supporting this proposition with citations to a dozen Supreme Court cases dating back to 1809).

266 *Id.* at 2764 (majority opinion).

267 *Id.* at 2765.

268 *Id.* at 2765–66 (citing Lindh v. Murphy, 521 U.S. 320 (1997)). *Lindh* concerned two revisions in 1996 to the federal habeas statute: Chapter 153 amended the scope of collateral review by federal courts in noncapital cases, while Chapter 154 was added to address state capital cases. Chapter 154 explicitly applied to pending cases, so the Court negatively inferred that Chapter 153 (which contained no such provision) did not. *Lindh*, 521 U.S. at 326–30. Justice Stevens interpreted the DTA the same way. *See Hamdan*, 126 S. Ct. at 2766.

By contrast, the dissenters emphasized that both statutory chapters in *Lindh* had effects that were not merely procedural but also substantive. Because substantive laws are presumed not to apply retroactively, Congress understood that it had to state explicitly if a chapter would apply to pending cases. *See id.* at 2813–14 (Scalia, J., dissenting) (citing *Lindh*, 521 U.S. at 327). In that situation, Chapter 153's absence of such a statement justified the inference that it would not reach pending cases. *Id.* at 2813–14. Moreover, Justice Scalia noted that sections 1005(e)(2) and (3) conferred new jurisdiction on federal courts (granting the D.C. Circuit exclusive review), and

intended to eliminate the Court's jurisdiction over Hamdan's case.[269]

b. Abstention

The government urged abstention under *Schlesinger v. Councilman*,[270] in which the Court declined to consider an army officer's contention that his charge for marijuana possession off-base was not sufficiently connected to his military service to trigger the jurisdiction of a court-martial.[271] Justice Stevens explained that neither of the comity considerations identified in *Councilman* was present. First, concern for maintaining military discipline and efficiency were inapt because Hamdan was not a member of America's armed forces.[272] Second, *Councilman* showed judicial respect for Congress's decision to create "an integrated system of military courts and review procedures,"[273] whereas Hamdan's military tribunal fell outside that system.[274]

---

that such laws creating (rather than stripping) jurisdiction are subject to the usual rule of nonretroactive application. *Id.* at 2813–15.

269 Justice Stevens buttressed this conclusion by citing floor statements and prior drafts of the DTA indicating that Congress deliberately had omitted section 1005(e)(1) from its directive that the statute should otherwise apply to pending claims. *Id.* at 2766, 2767 n.10 (majority opinion). *But see id.* at 2815–17 (Scalia, J., dissenting) (adducing contrary legislative history, stressing the unreliability of such evidence, and arguing that resort to such history is improper when the statute's text is clear).

Hamdan also claimed that interpreting the DTA as stripping the Court of jurisdiction would amount to an implicit suspension of the writ of habeas corpus, which Article I forbids except in rare circumstances. U.S. CONST. art. I, § 9, cl. 2. Justice Scalia countered that the writ did not extend to an enemy alien detained outside of the United States' territorial jurisdiction. *See Hamdan*, 126 S. Ct. at 2818 (citing Johnson v. Eisentrager, 339 U.S. 763, 768 (1950)). Moreover, even if a noncitizen enemy could apply for a habeas writ, Congress had provided a constitutionally adequate substitute: D.C. Circuit review would suffice to test the legality of the trial by military commission, and the Supreme Court retained its certiorari jurisdiction over the Court of Appeals' decision. *See id.* at 2818–19.

270 420 U.S. 738 (1975).

271 *Id.* at 740, *cited in Hamdan*, 126 S. Ct. at 2769–70.

272 *Hamdan*, 126 S. Ct. at 2770–71.

273 *Id.* at 2270 (quoting *Councilman*, 420 U.S. at 758).

274 *Id.* at 2271. Justice Stevens also relied on *Ex parte Quirin*, 317 U.S. 1 (1942), in which the Court declined to abstain because of the importance of the case, the public's interest in a swift decision, and the judiciary's duty to review alleged violations of constitutional rights. *Hamdan*, 126 S. Ct. at 2771–72 (citing *Quirin*, 317 U.S. at 19). Justice Scalia replied that in *Quirin*, unlike here, the federal government had sought a quick resolution, and that in any event *Quirin* was inapposite because Con-

In response, Justice Scalia pointed out that *Councilman*'s first factor also weighed "military necessities" and "exigencies," and he reasoned that "[i]f 'military necessities' relating to 'duty' and 'discipline' [in a marijuana case] required abstention in *Councilman*, military necessities relating to the disabling, deterrence, and punishment of the mass-murdering terrorists of September 11 require abstention all the more here."[275] As for the second criterion, he noted that Congress in the DTA had established a system allowing for military commissions and authorizing federal appellate review.[276] Justice Scalia warned that ignoring the DTA's process "br[ought] the Judicial Branch into direct conflict with the Executive in an area where the Executive's competence is maximal and ours is virtually nonexistent. We should exercise our equitable discretion to *avoid* such conflict. Instead, the Court rushes headlong to meet it."[277]

c. Analyzing the Court's Jurisdictional Ruling

The majority's jurisdictional conclusions are debatable. First, as Justice Scalia emphasized, "the Court . . . cannot cite a single case in the history of Anglo-American law (before today) in which a jurisdiction-stripping provision was denied immediate effect in pending cases, absent an explicit statutory reservation."[278] Second, under *Councilman*

---

gress in the DTA had created a system of Article III review of military commissions that did not exist in 1942. *Id.* at 2822 (Scalia, J., dissenting).

275 *Id.* at 2821 (quoting *Councilman*, 420 U.S. at 757).

276 *Id.* at 2821–22.

277 *Id.* at 2822.

278 *Id.* at 2812 (emphasis omitted). Even David Cole, perhaps the most ardent legal critic of the War on Terrorism, deemed it "remarkable" that "the Court decided the case at all in the face of Congress' efforts to strip the Court of jurisdiction." Cole, *supra* note 9. Similarly, Martin Flaherty conceded that the Republican Congress likely intended the DTA to eliminate the Court's jurisdiction in *Hamdan*, but applauded the Court for exploiting an "ambiguity" in the DTA's text to assert power. Flaherty, *supra* note 9, at 58.

My criticism of the Court for brushing aside a century and a half of case law does not mean I agree with that precedent. Rather, I reject the conventional wisdom that Congress can remove the Supreme Court's appellate jurisdiction over a federal question "case" and not assign that case to a lower federal court, thereby leaving final decisionmaking power in state tribunals. *See generally* Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847, 848–97 (developing the thesis that Congress must vest judicial power over all federal law cases in a federal forum). Under my approach, however, the DTA is valid because Congress merely reallocated jurisdiction over a federal question case from one Article III court (the Supreme Court) to another (the D.C. Circuit), not to a state tribunal.

abstention would have been justified.[279]

Thus, the Court's decision to assert jurisdiction likely reflected considerations unrelated to the straightforward application of the legal principles set forth in previous cases. From a practical standpoint, declining jurisdiction (or abstaining) might have cost the majority a golden opportunity to affirm the authority of both the judiciary and Congress to limit the President's exercise of war powers.[280]

Of course, it is hardly novel for the Court to manipulate jurisdictional doctrines in the military context. Almost invariably, however, the Justices have imaginatively interpreted jurisdictional statutes or

---

279 *See Hamdan*, 126 S. Ct. at 2820–22 (Scalia, J., dissenting). Because abstention is based upon equitable discretion rather than black-letter rules, the only fair criticism of the Court is that it has exercised such discretion unwisely, not unlawfully. In *Hamdan*, the Court could have obviated the need to decide several legal issues (and perhaps the entire case) by waiting until after the military commission rendered its decision and the D.C. Circuit conducted its review. Once again, my doubts about the Court's application of its abstention doctrines should not be taken as signifying my acceptance of their legal validity. *See* Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory that Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1300–05, 1338–39 (2005) (contending that allowing federal judges to abstain from deciding federal law cases violates their Article III duty to exercise all federal question jurisdiction conferred by Congress); Pushaw, *Justiciability*, *supra* note 38, at 398–99 (recognizing limited constitutional exceptions allowing courts to decline jurisdiction to avoid rendering advisory opinions, decisions on political questions, or judgments that can be revised by the elected branches).

280 *See* Yoo, *supra* note 14, at 99–103 (arguing that the Court defied Congress's command to refrain from exercising jurisdiction and ignored venerable precedent in order to reach its desired result of blocking the military commissions). Had the Court not taken jurisdiction, Hamdan would have been tried by the military commission and appealed any adverse rulings to the D.C. Circuit and the Supreme Court—a process likely to consume several years. By that time, one (or more) of the Justices in the majority might have been replaced by jurists more sympathetic to strong executive power. Chief Justice Roberts (as a circuit judge) and Justices Alito, Scalia, and Thomas all supported the President's authority to establish military commissions, and so the addition of a similar-minded Justice would have led to a different result. Now that *Hamdan* has been decided, however, a new conservative Justice dedicated to stare decisis might reaffirm that case even if he or she thought it was wrongly decided as an original matter. Of course, the Court in the future might overrule or distinguish *Hamdan*, but doing so might exact political and institutional costs.

Moreover, even if the Court's composition remained the same, perhaps the new President who assumes office in 2008 will be more willing to challenge the Court because he or she will be more popular than Bush, whose approval rating had sunk to a historic low of thirty-one percent in May 2006. Adam Nagourney & Megan Thee, *Poll Gives Bush His Worst Marks Yet On Major Issues*, N.Y. TIMES, May 10, 2006, at A1. Conversely, the new President might adopt less aggressive policies regarding enemy combatants, thereby mooting the legal issues.

invoked doctrines like justiciability and abstention to *avoid* reaching a decision on the merits. To take the most familiar example, the President's wartime actions have often been deemed unreviewable political questions.[281] *Hamdan* presents the exceedingly rare situation in which the Court distorted its jurisdictional precedent to reach a controversial legal issue. Examination of its decision on the merits reveals that the Court similarly disregarded its entrenched case law.

2. The Legality of Military Commissions

The majority ruled that Congress had not expressly authorized Hamdan's commission[282] and that its structure and procedures violated the UCMJ and the Geneva Conventions.[283] These two holdings—and the stinging dissents they prompted—will be examined in turn.

a. Congressional Authorization

Justice Stevens initially noted that the Court had never had occasion to define precisely the scope of the President's implicit constitutional power to convene military tribunals.[284] Most importantly, in *Quirin* the Court ducked this question because it concluded that Congress, through Article of War 15, had authorized the use of military commissions to try offenses against the law of war.[285] The majority observed that Article 15 had been incorporated into Article 21 of the UCMJ, which provides that the "'[j]urisdiction of courts-martial . . . shall not be construed as depriving military commissions . . . of con-

281 *See supra* notes 67–77, 83, 100–04, 107, 124–25, 154–63 and accompanying text.

282 *See Hamdan*, 126 S. Ct. at 2772–75; *id.* at 2799–2800, 2808 (Kennedy, J., concurring).

283 *See id.* at 2786–98. Justice Kennedy agreed that Hamdan's commission was unauthorized and that its structure and procedures were invalid. *See id.* at 2799–808. Therefore, he found it unnecessary to decide whether the law of war included conspiracy or whether Common Article 3 of the Geneva Conventions required that the accused be present at all stages of a trial. *Id.* at 2809. However, Justice Stevens and three colleagues reached these two questions. *See id.* at 2775–86 (plurality opinion) (determining that the law of war did not recognize conspiracy and that Common Article 3 guaranteed the right to be continuously present at trial). *But see id.* at 2826–38, 2846–49 (Thomas, J., dissenting) (rejecting these conclusions).

284 *See id.* at 2774 (majority opinion); *see also id.* at 2772–74 (explaining that military commissions had arisen in the nineteenth century out of necessity—to enable commanders to try cases that did not fall within the jurisdiction of courts-martial, which at that time was very limited).

285 *See id.* at 2774 (citing *Ex parte* Quirin, 317 U.S. 1, 28 (1942)); *see also id.* at 2802 (Kennedy, J., concurring) (similarly interpreting *Quirin*).

current jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such . . . commissions.'"[286] The Court interpreted this provision not as a sweeping mandate for the President to establish military commissions whenever he deemed them necessary, but rather as preserving the President's constitutional power to convene military commissions in accordance with the law.[287] Justice Stevens concluded that Congress had not intended to expand Article 21 in the AUMF or the DTA, neither of which contains language specifically allowing military tribunals at Guantanamo Bay.[288]

---

286 *Id.* at 2774 (majority opinion) (quoting Uniform Code of Military Justice, art. 15, 64 Stat. 115 (1950) (current version at 10 U.S.C. § 821 (2000))).

287 *Id.* (citing *Quirin*, 317 U.S. at 28–29).

288 *Id.* at 2775. Justice Stevens read the UCMJ, AUMF, and DTA as "at most [acknowledging] a general Presidential authority to convene military commissions in circumstances where justified under the 'Constitution and laws,' including the law of war." *Id.* Hence, Justice Stevens (along with Justices Souter, Ginsburg, and Breyer) thought it necessary "to decide whether Hamdan's military commission [was] so justified." *Id.*

This plurality concluded that the government had failed to charge Hamdan with any crime that fell within the jurisdiction of a military commission, which was restricted to trying certain offenses recognized by the laws of war that had been committed within the theater of war and had occurred during (not before or after) the armed conflict—here, since September 11, 2001. *See id.* at 2775–79 (plurality opinion). Justice Stevens asserted that, although the common law of war might include crimes not defined by statute if the precedent for doing so was unambiguous, the charged offense of conspiracy had no such pedigree. *See id.* at 2779–85 (maintaining that conspiracy had not been deemed an independent crime under the laws of war in American practice or in authoritative international law documents such as the Geneva Conventions, the Hague Conventions, or the International Military Tribunal at Nuremberg). He conceded that the defendants in *Quirin* had been charged with conspiracy, but pointed out that the Court had declined to decide whether conspiracy was a stand-alone offense under the laws of war because the other charges (committing overt acts of espionage and sabotage) clearly sufficed to trigger the jurisdiction of a military commission. *See id.* at 2781–82.

In dissent, Justice Thomas initially argued that the Court had no business second-guessing the President's judgment that Hamdan had acted within the "theater of war" (anywhere al Qaeda operated) during the armed conflict (which Bush determined began in 1996, when al Qaeda declared a jihad against America). *See id.* at 2826–28 (Thomas, J., dissenting). Moreover, he characterized the common law of war not as consisting of clear, fixed principles but rather as flexible, evolutionary, and respectful of the judgment of military commanders. *See id.* at 2828–30. Finally, Thomas contended that Hamdan had been charged with two offenses—membership in a war-criminal enterprise and conspiracy to commit war crimes—that had existed since at least the Civil War. *See id.* at 2830–36 (citing numerous cases); *see also id.* at 2838 (noting that *Quirin* and *Yamashita* refuted the plurality's claim that military commissions were always limited to rendering swift justice on the battlefield).

In dissent, Justice Thomas argued that the AUMF, by authorizing the President to use "'all necessary and appropriate force'" against those he determined were responsible for the 9/11 attacks, conferred power to try Hamdan by military commission for his involvement with al Qaeda.[289] Thomas demonstrated that such broad congressional delegations to the President had always been construed as including discretion to submit enemy combatants to military tribunals, and that the Court had recognized their validity in cases like *Quirin*.[290] Moreover, Justice Thomas maintained that Article 21 of the UCMJ did not set forth the entire reach of authorization of military commissions, but rather presupposed their existence under an independent grant of power (here, the AUMF).[291] This legislative approval meant that judicial deference should be at its zenith, and accordingly Justice Thomas chastised the Court for second-guessing President Bush's decision to employ such tribunals and "flout[ing] our well-established duty to respect the Executive's judgment in matters of military operations."[292]

b. The Military Commission's Structure and Procedure

The majority criticized two aspects of the commission's procedures. First, the accused could be excluded from, and prevented from learning what evidence was presented during, any part of the proceeding that the presiding officer decided to close for "'national security interests'" (e.g., safeguarding classified information; protecting law enforcement and intelligence sources or activities).[293]

289 *Id.* at 2823–25 (citation omitted).

290 *Id.* at 2824–25. Justice Thomas stressed that, because Congress cannot anticipate every possible action the President might find it necessary to take, a broad legislative authorization should not be read to imply that Congress intended to deprive the President of powers not specifically enumerated. *See id.* at 2823–24 (citing Dames & Moore v. Regan, 453 U.S. 654 (1981)).

291 *Id.* at 2825.

292 *Id.* at 2823. "The Court's evident belief that *it* is qualified to pass on the '[m]ilitary necessity' of the Commander in Chief's decision to employ a particular form of force against our enemies is . . . antithetical to our constitutional structure . . . ." *Id.* (citing *The Prize Cases*, 67 U.S. (2 Black) 635 (1863)). *See generally* Bradley & Goldsmith, *supra* note 23, at 2127–31 (providing detailed scholarly support for all of Justice Thomas's arguments).

293 *Hamdan*, 126 S. Ct. at 2786 (majority opinion) (quoting U.S. Dep't of Defense, Military Commission Order No. 1, § 6(B)(3) (Aug. 31, 2005) [hereinafter DOD Order], *available at* http://www.defenselink.mil/news/Sept2005/d20050902order.pdf). The accused's civilian lawyer could also be barred, whereas his appointed military defense counsel would be privy to the closed sessions but could be forbidden from revealing to the client what had transpired. *Id.* (citing DOD Order, *supra*).

Second, the presiding officer had discretion to (a) admit any evidence he deemed to have probative value to a reasonable person,[294] and (b) deny the defendant access to classified and protected information if he determined that doing so would not result in denial of a fair trial.[295] The Court held that these procedures violated both the UCMJ and the Geneva Conventions.

i. UCMJ

The majority interpreted UCMJ Article 36(b) as requiring that the procedural rules promulgated by the President for courts-martial and military commissions be "'uniform insofar as practicable.'"[296] Justice Stevens asserted that President Bush had failed to make an official determination of impracticability to justify his deviation from ordinary court-martial procedures, and that nothing in the record supported such a divergence.[297] The Court conceded that *Yamashita* was "a glaring historical exception to this general rule [of uniform-

294 *Hamdan*, 126 S. Ct. at 2787 (citing DOD Order, *supra* note 293, § 6(D)(1)).

295 *Id.* at 2787 (citing DOD Order, *supra* note 293, § 6(D)(5)(b)). The majority rejected the government's argument that the Court should wait to consider Hamdan's procedural challenges until after the commission's final decision and an appeal to the D.C. Circuit under the DTA, for two reasons. First, judicial review would be at the Court of Appeals' discretion unless Hamdan received a prison sentence over ten years or the death penalty. *Id.* at 2788. Second, Hamdan had already been excluded from his own trial—a procedural violation the Court could appropriately review immediately. *Id.*; *see also id.* at 2805–07 (Kennedy, J., concurring) (echoing these points, and emphasizing that the military commission's many deviations from an ordinary court-martial's structure, composition, and procedures cast doubt on the validity of Hamdan's trial).

296 *Id.* at 2790–92 (majority opinion) (quoting 10 U.S.C. § 836(b) (2000)); *see also id.* at 2801, 2804–08 (Kennedy, J., concurring) (same). The Court acknowledged that the President, pursuant to Article 36(a), had determined that it was impracticable to apply to Hamdan's commission the rules governing criminal trials in federal district courts. *Id.* at 2791 (majority opinion). Because Hamdan did not demand an original federal forum, however, the Court had no need to examine this presidential judgment.

297 *See id.* at 2791–92; *see also id.* at 2804–08 (Kennedy, J., concurring) (to similar effect). For instance, the majority maintained that the government did not suggest that there would be logistical difficulties in applying the usual rules of admissibility of evidence at Hamdan's trial. *Id.* at 2792 (majority opinion). Moreover, the Court concluded that the considerable general danger posed by international terrorism had not been shown to require variances from ordinary procedures in Hamdan's case. *Id.*; *see also id.* at 2805 (Kennedy, J., concurring) (noting that no exigency required a speedy trial, given that the government had already held Hamdan for over four years as an enemy combatant and would continue to detain him). Justice Stevens deemed the absence of a presidential justification under Article 36(b) "particularly disturbing" in light of the failure to honor a fundamental right afforded by both the UCMJ and

ity]," but concluded that Congress had responded to criticism of this decision by expanding the category of persons entitled to UCMJ protection to those in the position of Yamashita (and Hamdan).[298]

Justice Thomas responded that cases like *Quirin*, *Yamashita*, and *Madsen* had construed the predecessor of Article 36(b) as recognizing the President's longstanding power to establish military commissions and prescribe their procedures.[299] Thomas denied that later amendments to the UCMJ had limited executive authority; on the contrary, Article 36 had reaffirmed the President's discretion to create commissions that departed from ordinary procedures when he determined that uniformity would be impracticable.[300] Moreover, Justice Thomas contended that, even if the majority's reading of Article 36(b) were correct, President Bush had determined that it was impracticable to use court-martial rules because the War on Terrorism posed unique dangers to national security.[301]

ii. The Geneva Conventions

The Court further ruled that the military commission's procedures ran afoul of the Geneva Conventions.[302] Initially, Justice Stevens found that the Conventions were judicially enforceable because UCMJ Article 21 required compliance with the law of war (which included those Conventions).[303] In particular, Common Article 3 of the Geneva Conventions gave all prisoners captured in a conflict in

ordinary courts-martial: the right to be present. *Id.* at 2792 (majority opinion) (citing 10 U.S.C.A. § 839(c) (West Supp. 2006)).

298 *Id.* at 2788–89; *see also id.* at 2803–04, 2807–08 (Kennedy, J., concurring) (likewise stressing the limited relevance of World War II cases decided before Congress had enacted its current legal regime regarding courts-martial).

299 *Id.* at 2840–42 (Thomas, J., dissenting).

300 *Id.* at 2839–40; *see also id.* at 2842 (claiming that UCMJ Article 36 sought to ensure uniform procedures across the branches of the armed forces, not between courts-martial and military commissions).

301 *Id.* at 2842–43 (citing statements of executive branch officials).

302 *See id.* at 2793–96 (majority opinion); *id.* at 2799, 2802–04, 2807–08 (Kennedy, J., concurring).

303 *Id.* at 2793–94 (majority opinion). In Stevens's view, Article 21 controlled because it had been passed after the Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which contained a footnote stating that the Conventions were enforceable only by political and military (not judicial) authorities. *Hamdan*, 126 S. Ct. at 2794 (citing *Eisentrager*, 339 U.S. at 789 n.14); *see also id.* at 2802–03 (Kennedy, J., concurring) (contending that Article 21 had sapped *Eisentrager* of precedential force). *But see id.* at 2844–46 (Thomas, J., dissenting) (asserting that nothing in Article 21 altered *Eisentrager*'s correct holding that the Geneva Conventions were not judicially enforceable, and that in any event Common Article 3 covered only military tribunals, whereas UCMJ Article 21 concerned the different issue of whether an "offender" or "offense"

the territory of a signatory party (such as Afghanistan) the right to "'a regularly constituted court affording all the judicial guarantees . . . recognized as indispensable by civilized peoples.'"[304] The majority defined "a regularly constituted court" to mean a nation's preestablished ordinary military courts, which in the United States were the courts-martial created by Congress.[305] Hence, a military commission could not possibly be "regularly constituted" absent a demonstrated practical need to depart from court-martial practice.[306]

By contrast, the dissenters argued that Hamdan's military commission was a "regularly constituted court" because (1) it had been established pursuant to UCMJ Article 21 (which preserved the President's power to convene such commissions), and (2) such tribunals had long been recognized as valid for trials of enemy combatants accused of war crimes.[307] Moreover, Justice Thomas emphasized that the commission afforded all the indispensable judicial guarantees (e.g., the right to counsel and the "reasonable doubt" standard), except for access to proceedings and evidence that would compromise national security—and even then, denials of such access would be judicially reviewable to ensure a fair trial.[308]

---

was suitable for a military trial (quoting Uniform Code of Military Justice, 10 U.S.C. § 821 (2000)).

304 *Hamdan*, 126 S. Ct. at 2795 (majority opinion).

305 *Id.* at 2796–97; *see also id.* at 2799–800, 2802–08 (Kennedy, J., concurring).

306 *Id.* at 2796–97 (majority opinion); *see also id.* at 2799–800, 2802–08 (Kennedy, J., concurring). The plurality further concluded that the military commission convened to try Hamdan violated Common Article 3 because it denied the accused the right to be present and to be privy to inculpatory evidence. *Id.* at 2798 (plurality opinion) (citing DOD Order, *supra* note 293, §§ 6(B)(3), (D)); *see also id.* at 2785–86 (declaring that military necessity did not justify the President's resort to a military commission rather than a court-martial). Justice Thomas replied that the executive had preserved these rights to the extent feasible and had created an exception only where necessary to protect national security and classified information, and had retained judicial review to ensure a fair trial. *Id.* at 2847–49 (Thomas, J., dissenting); *see also id.* at 2846–47 (suggesting that Hamdan's claims under Common Article 3 would not become ripe unless and until the military commission convicted and sentenced him). Justice Kennedy found it unnecessary to decide whether Common Article 3 conferred a right to be present at all stages of a trial and to have access to all evidence. *Id.* at 2809 (Kennedy, J., concurring).

307 *See id.* at 2847 (Thomas, J., dissenting); *id.* at 2850–53 (Alito, J., dissenting).

308 *See id.* at 2848–49 (Thomas, J., dissenting); *see also id.* at 2850–53 (Alito, J., dissenting) (pointing out that any procedural or evidentiary problems could be remedied through judicial review, not by declaring the military commission itself illegitimate).

c. National Security and the Rule of Law

Ultimately, Justice Thomas concluded that the Constitution's text, structure, history, and precedent, as well as various federal statutes, all dictated judicial deference to President Bush's decision to create a military commission to try an enemy combatant.[309] Moreover, he asserted that the majority's disregard of well-settled law was singularly dangerous:

> We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilian workers, and has tortured and dismembered captured American soldiers. . . . [The Court's holding] sorely hamper[s] the President's ability to confront and defeat a new and deadly enemy.[310]

The majority acknowledged that Hamdan might be a dangerous individual who wished to hurt and kill innocent civilians, but noted that he "[did] not challenge . . . the Government's power to detain him for the duration of active hostilities in order to prevent such harm."[311] Nonetheless, the Court maintained that, if the executive branch sought to try Hamdan criminally, it had to comply with the "rule of law."[312] Justice Breyer echoed those concerns in his brief concurrence:

> The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.
>
> Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic

309 *See id.* at 2823–49 (Thomas, J., dissenting).

310 *Id.* at 2838; *see also id.* at 2830 (warning that the majority's approach "has dangerous implications for the Executive's ability to discharge his duties as Commander in Chief"); *id.* at 2839 (claiming that the Court's "willingness to second-guess the determination of the political branches" was "both unprecedented and dangerous").

311 *Id.* at 2798 (majority opinion); *see also id.* at 2804–05 (Kennedy, J., concurring) (recognizing the gravity of the charges against Hamdan and the government's right to imprison him).

312 *Id.* at 2798 (majority opinion).

> means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.[313]

3. A Critique of *Hamdan*

Despite the pledges of fealty to the rule of law by Justices Stevens, Breyer, and Kennedy, *Hamdan* illustrates that law has little to do with judicial review of war powers. Of course, the majority cited cases in which the Court had checked the President's attempts to claim sweeping authority, like *Milligan* and *Youngstown*, but they concerned domestic decisions affecting the rights of American citizens. In the precedent directly on point (*Quirin* and *Yamashita*), the Court confirmed the President's power to try alien enemy combatants by his own military tribunals, refused to question his judgment that these organs were necessary for national security, and declined to review their procedures.[314] Indeed, even Hamdan's own lawyer, Georgetown Law Professor Neal Katyal, conceded as much in a 2004 essay.[315]

It is possible that *Quirin* and *Yamashita* were wrongly decided. Perhaps, too, our most revered Presidents—Washington, Lincoln, and Roosevelt—illegally created military commissions. And maybe Congress has erred in consistently recognizing the validity of such executive power. If the Court in *Hamdan* had come to these weighty conclusions, it should have struck down this federal legislation as unconstitutional and overruled its incorrect decisions. Instead, the majority purported to apply its precedent and the applicable statutes, but stretched them beyond reasonable bounds in three key rulings.

First, the plurality and two concurring opinions cited the lack of congressional authorization for military commissions as dispositive.[316]

---

313 *Id.* at 2799 (Breyer, J., concurring).

314 *See* Yoo, *supra* note 14, at 91–93, 103–06; *see also id.* at 93–94 (explaining that the Bush military commissions featured many more procedural and evidentiary protections than those upheld in *Quirin* and *Yamashita*).

315 *See* Katyal, *supra* note 138, at 1253–54 (admitting that *Quirin* supported the validity of military commissions to try alien "enemy combatants," but arguing that *Quirin* should be treated as a "lapsed precedent" because it involved strikingly different factual and legal circumstances than the War on Terrorism); *see also* Katyal & Tribe, *supra* note 8, at 1284–85 (to similar effect). I disagree with this attempt to distinguish *Quirin*, for reasons set forth *infra* note 317.

316 *See supra* notes 284–89 and accompanying text; *see also* Flaherty, *supra* note 9, at 53–62 (praising the Court for insisting on Congress's focused involvement, including a requirement that Congress must clearly approve military tribunals and other war measures); Katyal & Tribe, *supra* note 8, at 1259–77, 1298–311 (arguing in 2002 that President Bush's unilateral creation of military commissions violated the Constitution because he had failed to obtain specific legislative authorization and no emergency justified bypassing Congress).

This conclusion conflicts with the most likely meaning of several statutes. Most significantly, in 1950 Congress effectively codified *Quirin*'s holding that Article 15 authorized the President to establish military tribunals by adopting Article 15's language verbatim in Article 21 of the UCMJ.[317] No later statute has altered this executive power, and post-September 11 legislation has reinforced it and triggered its exercise. For example, the AUMF directed the President to use "all necessary and appropriate force"[318] against the terrorists, and such force has always been understood to include detaining enemy combatants for the war's duration and trying them by military commission.[319]

317 *See* Goldsmith & Sunstein, *supra* note 8, at 274–75; *see also* Bradley & Goldsmith, *supra* note 23, at 2130 (citing supporting legislative history). An eminent scholar, writing shortly after the UCMJ had been enacted and hence unbiased by subsequent events, concluded that Article 21 acknowledged the President's longstanding and exclusive Article II power to create military commissions and to determine their powers and procedures. *See* ROSSITER, *supra* note 84, at 102–03, 109; *see also supra* notes 90, 110–14, 136 and accompanying text (describing the history of military tribunals established without congressional authorization). Disregarding this history and case law, the Court ruled that Article 21 does not sanction military commissions. *See Hamdan*, 126 S. Ct. at 2774–75.

Professors Katyal and Tribe have claimed that *Quirin* should be discounted as precedent in interpreting Article 15 because the Court rendered its judgment hastily, under extreme political pressure, and in the midst of a total war waged pursuant to Congress's declaration of war and its authorization of military commissions. Katyal & Tribe, *supra* note 8, at 1284–91. That argument is refuted by *Madsen v. Kinsella*, 343 U.S. 341 (1952), discussed *supra* notes 159–63 and accompanying text. The Court decided *Madsen* long after World War II had ended and under no pressures of time or governmental strong-arming. It expressly reaffirmed *Quirin*'s holding that "'[b]y the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.'" *Madsen*, 343 U.S. at 355 n.22 (quoting *Ex parte* Quirin, 317 U.S. 1, 28 (1942)); *see also id.* at 352 ("Article 15 . . . states unequivocally that Congress has not deprived such commissions or tribunals of the[ir] existing jurisdiction . . . ." (citing *In re* Yamashita, 327 U.S. 1 (1946); *Quirin*, 317 U.S. 1)); *id.* at 355 (citing *Yamashita* as approving *Quirin*'s interpretation of Article 15). Finally, the Court in *Madsen* noted that Congress had recently reenacted Article 15 as Article 21 of the new UCMJ to preserve the existing practice regarding military tribunals. *Id.* at 315 n.17. Thus, it is clear that *Quirin* is still alive and well.

318 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. III 2003)).

319 *See* Bradley & Goldsmith, *supra* note 23, at 2127–33 (citing history); *see also* Paulsen, *supra* note 59, at 252, 256–57 (contending that the AUMF contained arguably the broadest delegation of war powers ever to a President, and certainly authorized the creation of military commissions). Nonetheless, two distinguished scholars have maintained that, although imprisoning unlawful combatants is part of the President's power as Commander in Chief to wage war successfully, military commissions fall into the different realm of adjudicating and punishing alleged violations of law.

Thus, it is difficult to fathom why the Court found that the AUMF implicitly authorized the former (*Hamdi*) but not the latter (*Hamdan*). Rather, the best, and most consistent, legal interpretation would be that the AUMF conferred both powers (Justice Thomas's view).[320] Any doubt about whether Congress authorized military commissions in the AUMF or UCMJ Article 21 should have been erased by Section 1005(e)(3) of the Detainee Treatment Act.[321] Congress must have thought President Bush had legally formed the military commissions, or else it would have repudiated them rather than providing for an appeal from their judgments.[322]

The Court's strict construction of statutory provisions that seemed to confer power on the President (the AUMF, UCMJ, and DTA) contrasts sharply with its loose interpretation of sections 1005(e)(1) and (h) of the DTA, which appeared to deprive it of jurisdiction. Therefore, the majority Justices' suggestion that they were modestly trying to ensure congressional authorization for government action is true only as to the executive branch, not the judiciary.[323]

Second, the Court concluded that Bush's military commissions violated UCMJ Article 36(b) by unjustifiably employing different procedures than courts-martial.[324] However, Article 36's language, legislative history, and background norms all indicate that it simply acknowledged the President's long-established authority to prescribe procedures for military commissions—and to diverge from court-mar-

---

See Katyal & Tribe, *supra* note 8, at 1270. Although that distinction has a certain logic in theory, in practice the Court has always accepted the President's determination that trials by military tribunal are one aspect of prosecuting war.

320 *See Hamdan*, 126 S. Ct. at 2823–25 (Thomas, J., dissenting); Hamdi v. Rumsfeld, 542 U.S. 507, 579–98 (2004) (Thomas, J., dissenting); *see also* Yoo, *supra* note 14, at 97, 99–100, 109–10 (supporting Justice Thomas's analysis). Justices Souter and Ginsburg also showed intellectual consistency (albeit a disdain for precedent) in articulating the converse of Thomas's position: that the AUMF authorized neither detention nor military commissions because of countervailing statutory provisions. *See supra* notes 205–07, 259, 282–88 and accompanying text (summarizing this approach). Finally, Justice Scalia also demonstrated internal logic by arguing that the President cannot detain or try by military commission any United States *citizen* (such as Hamdi), but can take such actions against *noncitizens* (like Hamdan). *See supra* notes 207–13, 226–29 and accompanying text (describing Justice Scalia's perspective).

321 Pub. L. No. 109-148, § 1005(e)(3), 119 Stat. 2739, 2741–42 (2005) (codified at 10 U.S.C.A. § 801 note (West Supp. 2006)).

322 *See* Yoo, *supra* note 14, at 97.

323 *See* Roger Pilon, *Foreword: Politics and Law, Again*, 2006 CATO SUP. CT. REV., at vii, xiii (asserting that the majority ignored Congress's exercise of its power to limit the Court's jurisdiction while simultaneously purporting to enhance Congress's authority).

324 *See Hamdan*, 126 S. Ct. at 2790–92.

tial procedures when he determined that following them would be impracticable.[325]

Third, the Court held that UCMJ Article 21's reference to the "law of war" incorporated Common Article 3 of the Geneva Conventions—and implicitly overruled *Eisentrager*'s interpretation of the Conventions as unenforceable judicially.[326] Here the Court made, in Professor Yoo's words, a "glaring mistake of simple chronology."[327] The UCMJ could not possibly have overturned *Eisentrager*, which was decided a month after the UCMJ's enactment.[328] Similarly, Congress could not have intended to incorporate Common Article 3 of the Geneva Conventions—ratified in 1955—into the UCMJ, which was passed in 1950.[329]

In sum, the *Hamdan* Court's analysis of every major issue was implausible under existing law. This conclusion cannot be dismissed as merely the opinion of disappointed conservative Republicans like Justice Thomas and John Yoo. Rather, even David Cole, the most acidic and prolific academic critic of the War on Terrorism and a staunch supporter of the Court's decision, acknowledged that the majority had disregarded its precedent:

> To say that Hamdan faced an uphill battle is a gross understatement. The Supreme Court has said in the past that foreign nationals who are outside U.S. borders, like Hamdan, lack any constitutional protections. Hamdan was a member of the enemy forces when he was captured, and courts are especially reluctant to interfere with the military's treatment of "enemy aliens" in wartime. He filed his suit before trial, and courts generally prefer to wait until a trial is completed before assessing its legality. And as recently as World War II, the Supreme Court upheld the use of military tribunals, and ruled that the Geneva Conventions are not enforceable by

325 *See id.* at 2839–43 (Thomas, J., dissenting); Bradley & Goldsmith, *supra* note 23, at 2130 n.366 (providing further support for Justice Thomas's argument).

326 *See Hamdan*, 126 S. Ct. at 2793–96 (majority opinion); *see also* Katyal, *supra* note 9, at 71, 98, 110–12 (contending that the Court correctly insisted that military trials must have the essential elements of military justice and comply with the Geneva Conventions).

327 *See* Yoo, *supra* note 14, at 109.

328 *See id.* at 108–09 (setting forth this chronology). Justice Stevens specifically, and wrongly, asserted that Article 21 had been passed after the Court's *Eisentrager* decision. *Hamdan*, 126 S. Ct. at 2794.

329 *See* Yoo, *supra* note 14, at 107–09 (compiling relevant documentation). One might argue that the UCMJ's "law of war" phrase refers to an evolving legal system and hence encompasses all later changes to that law. However, the Court presented no evidence that the "law of war" contained in the Geneva Conventions contemplated judicial rather than political enforcement or that Congress intended, contrary to the Conventions, to provide a federal court forum. *See id.* at 107–08 (citing sources).

> individuals in U.S. courts but may be enforced only through diplomatic means.
>
> . . . And as if Hamdan did not face enough hurdles, after the Supreme Court agreed to hear his case, Congress passed a law [the DTA] that appeared to be designed to strip the Supreme Court of its jurisdiction to hear the case.
>
> . . . . The fact that the Court decided the case at all in the face of Congress' efforts to strip the Court of jurisdiction is remarkable in itself. That the Court then broke away from its history of judicial deference to security claims in wartime to rule against the president, not even pausing at the argument that the decisions of the commander in chief are "binding on the courts," suggests just how troubled the Court's majority was by the President's assertion of unilateral executive power.[330]

In other words, precedent demanded that the Court decline jurisdiction (or at least defer to the President's decision to try Hamdan by military commission), but five Justices were so "troubled" that they ignored this law to whack Bush. The legal consideration identified by the majority as central—lack of congressional authorization—is so unconvincing as to invite an inquiry into their real motives. Once again, the Justices seem to have engaged in a discretionary, pragmatic weighing of three factors.

The first was the severity of the crisis. Justice Stevens and his colleagues apparently viewed 9/11 as an isolated event with no recurrence for five years, and hence unlike an ongoing and nation-menacing conflict such as World War II.[331] These Justices obviously were aware that the terrorists might in the future wage such an all-out war, but believed that until then the Court should insist on ordinary procedures (like courts-martial). By contrast, dissenting Justices like Thomas characterized terrorism as a pressing, continuous, and mortal threat. Consequently, they found it prudent to allow the President to create a military commission with discretion to deny Hamdan access

---

330 *See* Cole, *supra* note 9; *see also* Pilon, *supra* note 323, at v, xii (noting Cole's praise of *Hamdan*, despite its conceded legal weaknesses). On this score, Professor Cole agreed with Bush's chief defender, John Yoo, who charged that the Court had "tossed aside centuries of American history, judicial decisions of long standing, and a December 2005 law ordering them not to interfere with the military trials." John Yoo, *Five Wrong Justices: Ruling Mistakes War for Formality of Nation's Criminal Justice System*, USA TODAY, June 30, 2006, at 22A.

331 *See* Goldsmith & Sunstein, *supra* note 8, at 280–81 (pointing out that the legal elite approved military tribunals in World War II—a total war mobilizing the entire nation in a fight for its survival—but not in the War on Terrorism, which they see as a comparatively low-stakes conflict involving few changes or sacrifices in daily life).

to information that he could pass on to al Qaeda operatives, possibly enabling them to harm and kill Americans.

Second, the members of the Court had radically different perspectives on the egregiousness of the legal violation. Formally, the majority in *Hamdan* held only that the President lacked legislative permission to establish military tribunals. That statutory interpretation, however, reflected fundamental concerns of due process—ensuring that the structure and procedures of military courts instill confidence that trials will be fair and impartial. The majority saw the military commissions as kangaroo courts with the discretion to bar the accused from the trial, deny his access to relevant information, and admit unreliable evidence—all subject to the executive branch's power to alter the procedural rules at any time or to terminate the proceedings.[332] The dissenters, on the other hand, perceived no legal problem with trying alien enemy combatants by military commission rather than court-martial. Indeed, such a commission struck them as especially appropriate for Hamdan, a trusted aide of Osama bin Laden.[333] Justice Thomas thought Hamdan was lucky to have been given the usual criminal procedural rights, except for access to information that might threaten national security.

Third, the Court did not mention, but surely knew, that President Bush would obey its judgment. Despite his tough stance in prosecuting the War on Terrorism, he had never so much as hinted that he would defy a judicial order. Even if Bush were so inclined, he did not have the political strength to do so. At the time *Hamdan* came down, Bush's popularity rating had sunk to historic lows, and he had little political capital to waste.[334] Moreover, the Court wisely did not put Bush's back up against a wall by declaring military commissions unconstitutional. Rather, the majority signaled that such tribunals would pass muster if Congress explicitly approved them. Returning the courtesy, President Bush responded that he took the Court's rul-

332 *See* Katyal, *supra* note 9, at 74–75, 87–91, 99–105 (arguing that the Court's statutory construction incorporated constitutional considerations raised by the President's assertion of unilateral and legally unlimited power to establish military commissions, promulgate questionable rules of procedure and evidence, and change such rules at his whim).

333 It is important to bear in mind that Hamdan is an admitted al Qaeda insider, not someone languishing in Guantanamo Bay because he had been swept up in an overzealous post-September 11 raid. Brief of Washington Legal Foundation and Allied Educational Foundation as Amici Curiae Supporting Respondents at 4, *Hamdan*, 126 S. Ct. 2749 (No. 05-194), 2006 WL 467688 (citing February 9, 2004 Affidavit of Salin Ahmed Hamdan, at 1–2).

334 Bush's approval rating had hit an all-time nadir of thirty-one percent the month before the Court decided *Hamdan*. *See supra* note 280.

ing "very seriously" and would work with Congress to enact a law on military commissions that would satisfy the majority's concerns.[335] Bush thereupon did exactly as promised, and Congress swiftly authorized such tribunals with very broad powers.[336]

As with the 2004 detention decisions, then, *Hamdan* is a setback for the President, but hardly the devastating blow imagined by many commentators.[337] The Court has not plunged into a brave new world of bold judicial review. Rather, four Justices (Roberts, Scalia, Thomas, and Alito) embraced strong executive power; two others (Kennedy and Breyer) concurred to emphasize the limited nature of the Court's holding; and even Justice Stevens and his allies did not question the President's authority to detain alien enemy combatants like Hamdan or to try them outside of the ordinary federal court system. Rather, the majority seized an opportunity to check a politically vulnerable President by requiring him to obtain unmistakable authorization from Congress before using military commissions in a nonemergency situa-

335 *See* Savage, *supra* note 9.

336 Military Commissions Act (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006). The quick passage of the MCA casts doubt on the *Hamdan* Court's suggestion that the President had disregarded Congress's will in establishing military commissions. Indeed, the MCA rejects *Hamdan* in three important ways. First, the majority's conclusion that the UCMJ required the executive to demonstrate in litigation the impracticability of applying court-martial rules has been repudiated in section 949a(a) of the MCA, which grants the Secretary of Defense discretion to employ such rules "so far as [he] considers practicable or consistent with military or intelligence activities." Second, Congress disavowed the Court's expansive interpretation of the Geneva Conventions by declaring that (1) the military commissions were "regularly constituted courts" that met the requirements of Common Article 3, and (2) alien unlawful enemy combatants could not invoke the Conventions as a source of legal rights. *See* MCA §§ 948b (f)–(g); 28 U.S.C. § 2241, note § 5(a). Third, Congress disapproved *Hamdan* and *Rasul* by eliminating federal court jurisdiction to consider habeas petitions and other actions filed by alien enemy combatants. *See* MCA § 950j(b); 28 U.S.C. § 2241 note § 7(a). Rather, the statute authorizes review exclusively by various military tribunals, followed by appeals to the D.C. Circuit and the Supreme Court. *See* MCA § 950b–g. Congress did, however, address one of the Court's major concerns by guaranteeing the accused's right to be present at all proceedings as long as he does not engage in disruptive or dangerous conduct. *See* MCA §§ 949a(b)(1)(B), 949d(b), (e).

337 *See* Yoo, *supra* note 14, at 109; *see also supra* notes 9–10 (setting forth the views of numerous scholars). Unlike in *Hamdi*, the majority and concurring opinions in *Hamdan* did not mention the traditional deference shown to the executive branch's military judgments. Professor Flaherty interprets this silence as signaling increased judicial skepticism towards presidential claims of national security. *See* Flaherty, *supra* note 9, at 74–76. Although that trend is possible, I doubt that the Court has suddenly abandoned its historical posture of deference. Rather, it is flexing its muscles against President Bush because it can.

tion where regular procedures could be followed. The Court conspicuously avoided grand constitutional pronouncements and focused on the particular circumstances.

The situation, and hence the Court's approach, could change in an instant. For example, if the terrorists had succeeded in their July 2006 plot to blow up ten planes bound from England to the United States,[338] Americans would have clamored for much tighter security measures and harsh treatment of the perpetrators. In such a climate, the Justices would become more reluctant to guarantee procedural niceties to accused terrorists.

Overall, the four "enemy combatant" decisions follow a historical pattern in which the Court has curbed the President and vindicated individual rights when politically feasible to do so. Such cases represent a statistical minority, however, as the Justices usually defer to the military judgments of the majoritarian branches, often because they have no other realistic choice. If the terrorists escalate their attacks and the President responds aggressively, history suggests that the Court will back down.

IV. DEFENDING THE COURT'S DEFERENTIAL APPROACH

Many scholars have criticized the Court for failing to apply the same level of review in disputes involving war powers as it does in domestic cases—i.e., following its independent interpretation of the Constitution, despite the contrary views of elected officials and possible negative political consequences.[339] This argument gives short shrift to basic elements of the Constitution's design which have always

338 Alan Cowell & Dexter Filkins, *Terror Plot Foiled; Airports Quickly Clamp Down*, N.Y. TIMES, Aug. 11, 2006, at A1.

339 *See supra* note 11 and accompanying text. On the domestic front, the Rehnquist Court did not hesitate to strike down federal statutes that, in its judgment, exceeded Congress's powers under the Commerce Clause or Section 5 of the Fourteenth Amendment. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 607–27 (2000) (invalidating the Violence Against Women Act, which had been passed under both of these powers); *see also* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations But Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 132–36 (1999) (discussing *Morrison*). Similarly, the Court followed its interpretation of the First Amendment in striking down hugely popular federal and state laws banning flag burning. *See* United States v. Eichman, 496 U.S. 310, 317–19 (1990); Texas v. Johnson, 491 U.S. 397, 414–20 (1989). Finally, the Court even resolved the 2000 presidential election deadlock, based on a creative reading of the Equal Protection Clause. *See* Bush v. Gore, 531 U.S. 98, 104–10 (2000); *see also* Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603, 619–23 (2001) (discussing this issue).

generated special (and very deferential) standards for reviewing the exercise of military powers.

As the Founders recognized, war raises issues of utmost national importance which Congress and the President can and will address, and they will be held politically accountable for their decisions.[340] Subjecting such delicate policy judgments to exacting scrutiny by unelected judges with no expertise in military affairs seems inappropriate in a constitutional democracy.[341] Furthermore, the political departments, especially the executive, have overwhelming institu-

---

I do not mean to imply, however, that in domestic cases the Court is heedless of political consequences. Although such considerations are rarely mentioned in opinions, there are some notable exceptions. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 868–78 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (declining to overrule *Roe v. Wade*, despite doubts about its correctness as an original matter, in part because doing so might create the impression that the Court was yielding to political and social pressure). Another familiar example is the continuing application of the political question doctrine to certain domestic disputes, such as impeachment. *See* Nixon v. United States, 506 U.S. 224, 229–38 (1993).

340 *See supra* notes 44–63 and accompanying text.

341 *See* Yoo, *supra* note 14, at 83–84 (stressing that the Court's traditional deference to the political branches in military and foreign affairs reflects the constitutional plan). This proposition seems unassailable as to decisions that affect all Americans equally, such as declaring war and rationing goods that are vital to the war effort. However, political checks have proved unreliable when a fearful majority overreacted to a crisis and supported the political branches' suppression of the constitutional rights and liberties of vulnerable and powerless minority groups (e.g., Japanese-Americans during World War II) and unpopular individuals (e.g., left-wing antiwar protestors during World War I and the Cold War). *See* Cole, *Judging*, *supra* note 8, at 2565–71, 2575, 2590–95. In such situations, the only possible forum for relief has been an independent Article III court charged with the duty to hear complaints that the government's actions ran afoul of the Constitution. *Id.* at 2590–95. Even though federal courts have often performed this job poorly, they have sometimes acted courageously and have often set forth legal principles that constrain the government from excessive measures in later emergencies. *Id.* at 2565–68, 2587–95.

The foregoing arguments explain why federal judges have always entertained claims that military decisions have violated individual rights, albeit under very forgiving standards and with an awareness of political realities. I believe that such lenient judicial review is appropriate, and I would not endorse complete judicial abdication except in very rare and limited circumstances. *See infra* notes 351–57 and accompanying text.

Professors Posner and Vermeule reject the assertion that fear and panic have caused government officials to exaggerate military risks and to adopt bad policies that have unreasonably restricted civil liberties, thereby justifying more searching judicial review. Posner & Vermeule, *supra* note 12, at 609–11, 626. Rather, they contend that fear can motivate clear and decisive action that better protects national security while still preserving individual rights and liberties at an optimal level. *Id.* at 609–11, 626–42.

tional advantages in this area.[342] Congress's powers to declare war, fund the armed forces, and oversee executive actions are designed to ensure broad-based support for military efforts.[343] The President alone can respond to emergencies and can implement war strategy with the requisite swiftness, decisiveness, and access to information (which is often secret).[344] By contrast, the judiciary inherently proceeds far more slowly and deliberatively than either Congress or the President. Indeed, courts can do nothing until a party files suit. Even then, judges must conduct time-consuming trials that (absent a settlement) culminate in a reasoned judgment that applies the law to the pertinent facts, followed by appeals that consider the legal issues still further.[345] Therefore, several years typically elapse between the executive's action and the Supreme Court's decision. This passage of time often enables the Justices to evaluate constitutional law issues far more dispassionately than would have been possible in the heat of the military crisis.[346] Even then, however, courts can fairly judge the President only based upon the facts as he understood them at the moment of decision, not with the benefit of hindsight.[347]

Finally, the judicial time lag is sometimes insufficient because a nation-threatening war drags on, the President has charted an irrevocable course, and he will defy any order requiring him to comply with the Court's legal views.[348] In such critical situations, rendering a judgment seems pointless, for its only effect will be to compromise the

342 *See* Nzelibe, *supra* note 64, at 975–99.

343 *See supra* notes 45–52 and accompanying text.

344 *See supra* notes 53–60 and accompanying text; *see also* Cole, *Judging*, *supra* note 8, at 2570 (recognizing that judges feel ill-equipped to assess the executive branch's claims of national security because it has a monopoly on the relevant information).

345 For discussion of the essential attributes of judicial power, see Pushaw, *Justiciability*, *supra* note 38, at 415–27; Pushaw, *Inherent*, *supra* note 38, at 746, 789, 805–06, 809, 827, 844–46; *see also* Yoo, *supra* note 242, at 590–600 (maintaining that federal courts are institutionally in a poor position to make judgments about national security because of their slow processes, their focus on specific facts and issues rather than general policies, and their lack of expertise in military and foreign affairs).

346 The Court sometimes acknowledges this reality. *See supra* note 122 and accompanying text; *see also* Cole, *Judging*, *supra* note 8, at 2566, 2575–76 (providing examples).

347 *See* Tushnet, *supra* note 185, at 282–92, 300, 307 (arguing that political officials, especially the President, must make decisions when the war's outcome is uncertain and information is often incomplete or inaccurate (sometimes because of a subordinate official's mistakes or biases), whereas later critics of such decisions, including courts, have the advantage of hindsight); Maltz, *supra* note 12, at 863–70 (to similar effect).

348 *See supra* Part II.B.1, II.C (discussing the interaction between the President and the Court during the Civil War and World War II).

Court's legitimacy. For instance, Chief Justice Taney's unheeded order to Lincoln to release a military prisoner ended up highlighting the Court's own impotence.[349] It is worth remembering that today we revere Lincoln and revile Taney. Nonetheless, the Chief Justice showed real courage in confronting Lincoln throughout the Civil War, as did Justice Jackson in standing up to his patron Franklin Roosevelt during World War II in *Korematsu*. Such genuine acts of judicial valor should not be cheapened by comparing them with the Court's exploitation of politically weak and unpopular Presidents like Andrew Johnson, Harry Truman, and George W. Bush.

In short, the Court has generally, and appropriately, recognized that separation of powers dictates great respect for the military decisions of Congress and the President. Moreover, the Justices have inevitably decided cases based not simply upon abstract rules of law, but also upon various political and practical considerations. Operating within these constitutional and pragmatic confines, the Court has tried to articulate and enforce individual rights and liberties to the extent possible, as it did recently in the "enemy combatant" litigation. On the whole, I think the Court has performed about as well as can be expected, even though I disagree with many of its rulings.[350]

The only cases where I would change the approach (albeit not the result) are those in which a politically powerful President, such as Lincoln or Roosevelt, has made a decision to violate a particular constitutional provision because he concludes that such a drastic measure is necessary to win a war that imperils America's very existence, and therefore will likely disobey any judicial order to halt the policy. In such unique circumstances, the Court should not uphold the President's actions on the merits. Rather, it should avoid decision altogether by denying certiorari,[351] declaring the question presented to

---

349 *See supra* notes 94–99 and accompanying text; *see also* Cole, *Judging*, *supra* note 8, at 2570–71 (acknowledging that such defiance, when the President has concluded that national security is at stake, weakens the Court's credibility).

350 For example, I believe that *Rasul* and *Hamdan* rest on incorrect statutory interpretations that disregard precedent squarely on point, and that these cases might impede our efforts to combat worldwide terrorism. So far, however, they have not had any catastrophic effects. *See* Katyal, *supra* note 9, at 104 (observing that the Bush Administration's dire warnings that adverse decisions in *Hamdi*, *Rasul*, and *Hamdan* would threaten national security have not materialized).

351 Since 1988, the Court has had complete discretion in deciding whether or not to grant such a writ. *See* 28 U.S.C. § 1254 (2000). Hence, denying review raises no legal problems.

be "political,"[352] or delaying judgment through resort to doctrines such as ripeness.[353]

Admittedly, the selective invocation of judicial restraint concepts can be decried as unprincipled, even cowardly.[354] Nonetheless, what actually happened in cases like *Korematsu* was even more legally and morally indefensible: sustaining blatantly unconstitutional conduct, which gave the President the invaluable stamp of approval by the Supreme Court, our most respected and prestigious government institution.[355] Instead, the Justices should have forced Congress and the President to accept total responsibility for their actions, to be judged by voters and posterity.[356]

---

352 *See* Pushaw, *supra* note 43 (examining the political question doctrine). I would confine my proposal to this unusual situation. Other scholars have contended more broadly that courts should frankly recognize that executive officials will exercise extra-constitutional powers during emergencies and should leave judgment on such actions to the political process, instead of rationalizing such measures as constitutionally valid and thereby contaminating constitutional law. *See, e.g.*, Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 YALE L.J. 1011, 1121–26 (2003); Tushnet, *supra* note 185, at 298–307.

353 *See* MAY, *supra* note 37, at 272–73 (deeming ripeness especially useful because it allows a court to consider its capacity to adjudicate a case properly in light of the nature of the emergency, its relationship to the challenged measure, the state of the factual record, and the type of relief sought).

354 The classic defense of such jurisdictional manipulation, for the purpose of ensuring that constitutional decisions on the merits are always principled, is ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (2d. ed. 1986) (1962). I do not believe, however, that Bickel's approach should be applied outside the context of an implacable President engaged in a cataclysmic war. *See* Pushaw, *Justiciability*, *supra* note 38, at 465–67 (criticizing Bickel's argument).

355 *See* Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting); Tushnet, *supra* note 185, at 301 (citing CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT 47–86 (1960)) (emphasizing that the Supreme Court legitimizes government actions taken in an emergency by upholding their constitutionality); *see also* MAY, *supra* note 37, at 260–68 (arguing that the political question doctrine amounts to an abdication of duty, but is still preferable to the *Korematsu* approach of approving a measure that risks permanent damage to the Constitution).

356 Some scholars have countered that principled judicial review is necessary to facilitate meaningful congressional involvement. *See, e.g.*, ELY, *supra* note 11, at 47–67. Concededly, many constitutional provisions require Congress to take affirmative steps to authorize executive action during wartime. Most pertinent here is the prohibition on suspending habeas corpus absent express congressional approval in times of invasion or rebellion. This clause indicates that the President cannot detain citizens during wartime without such legislation (or a criminal indictment). *See* Hamdi v. Rumsfeld, 542 U.S. 507, 554–79 (2004) (Scalia, J., dissenting), discussed *supra* notes 208–13 and accompanying text. *But see* Tushnet, *supra* note 185, at 301–03 (contending that it is futile to expect a Constitution's designers to be able to formulate a provision, such as the Nonsuspension Clause, that will always constrain

With this single exception, I believe the Court's approach is defensible on both constitutional and pragmatic grounds. Indeed, it is wishful thinking to expect that the Court can, or will, apply robust judicial review to political branch actions during wartime.

V. CONCLUSION

Our Founding Fathers wisely committed the formulation and execution of military policy to Congress and the President. When political decisions about war allegedly invade individual constitutional rights, the Supreme Court has either declined to intervene or has applied a deferential standard of review whereby the government's actions are usually (but not always) upheld. Admittedly, war powers jurisprudence is not a model of legal consistency. Nor can it be, for the Court has properly paid close attention to the facts and context of each case—and to its own institutional and political limits during wartime.

Accordingly, it would be a mistake to interpret the recent cases upholding the rights of enemy combatants as portending a more general shift towards greater protection of individual liberty in the military context. History has taught us that such decisions are the exception, not the rule. During wartime, judicial discretion is usually the better part of valor.

---

future exercises of power in response to emergencies that they could never have foreseen, such as the attack on the World Trade Center); Ackerman, *supra* note 185, at 1038, 1053, 1084–87 (to similar effect). Likewise, Article I restricts any appropriations for military support to a two-year maximum and allows Congress to decline to provide such funding or to halt a prior appropriation. *See supra* notes 48–49, 61 and accompanying text. Historically, judicial nonenforcement of such constitutional provisions has resulted in the President asserting discretion to act and Congress doing nothing to stop him, thereby effectuating a vast accumulation of power in the executive.

The short response is that the Constitution allocates war powers to the political branches, not the judiciary. *See* Yoo, *Continuation*, *supra* note 12, at 299–300. Congress's failure to exercise its ample Article I powers to check the President (e.g., by denying military funding) does not somehow authorize federal courts to step in to encourage Congress to act. *Id.*

Although federal judges cannot referee disputes between Congress and the President over war powers, they can enforce constitutional provisions (e.g., the Nonsuspension Clause) at the behest of an individual who alleges unlawful federal government conduct that affects her. Whether such review proves successful depends primarily on the circumstances of the case.